IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 281-282

IN THE MATTER OF GRANADA APARTMENTS, INC.,
Debtor.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST CO. OF CHICAGO, AND OTHERS,
Respondents.

PETITIONER'S BRIEF.

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To the Honorable Justices of the Supreme Court of the United States:

Opinions Below.

The United States District Court's findings of fact and conclusions of law were not published in the Federal Supplement, but are to be found at pages 769 to 794 of the printed record. The District Court's decree is to be found at pages 794-795 of the printed record.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is to be found at 111 Fed. (2nd) 834 and at pages 935 to 969 of the printed record.

Jurisdiction.

In the exercise of the judicial power granted to this court by Article III of the Constitution of the United States, Your Honors assumed appellate jurisdiction of the cases at bar on October 14, 1940, by issuing writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit.* The cases were presented to Your Honors upon the petition for certiorari duly filed by this petitioner on July 25, 1940, pursuant to Section 240(a) of the Judicial Code. The cases arose under the laws of the United States, *i. e.*, the Chandler Act and the Federal Rules of Civil Procedure and also under the Constitution of the United States, *i. e.*, the Fifth Amendment.

The petition for certiorari stated that the case presented five principal questions. These questions are:

First. When a "Bondholders' Committee" in violation of its fiduciary relation to the bondholders has represented adverse interests without disclosing such fact, does the law permit fees and expenses to be allowed to such a committee in a Federal reorganization proceeding?

Second. As a matter of law, are a trustee and its attorneys (all of whom have committed breaches of trust and have represented adverse interests without disclosure) entitled to fees in a Federal reorganization proceeding?

Third. Must a Circuit Court of Appeals function according to due process of law and decide the case on the issues raised in the District Court, or can it (without notice or hearing) in violation of constitutional law reverse the trial court's findings, which findings were not contested or assigned as error in either court?

Fourth. May a court of appeal reverse and overrule the findings of fact by the trial court, contrary to Rule 52 of Civil Procedure, and without analysis of the evidence upon which those findings were made?

* PR. 1638.

Fifth. Has a Circuit Court of Appeals jurisdiction of an appeal taken in violation of Section 250 of the Chandler Act and presented without a record having been filed as prescribed by Rule 73(g) of the Federal Rules of Civil Procedure?

The jurisdiction of the United States District Court was based upon the Bankruptcy Laws of the United States as enacted and amended by the Congress.

The jurisdiction of the Seventh Circuit Court of Appeals is denied by the petitioner. This contention is discussed at Point IV of the Argument.

Statement of the Case.

In the District Court.

On one October afternoon at the Federal Courthouse in Chicago, two men were concerned about the affairs of a bankrupt apartment house property, then on trial and under investigation. A claim of a bondholder's committee for fees (and other pleadings) had been filed.[1] The momentary inquiry was to find out how the committee had come into being. One man was the United States District Judge. The other man (on the witness stand) was a member of this bondholders' committee whose name was Mr. Sturm. The inquiry pursued under the statute,[1-A] was about the Granada Bondholders' Committee. The Granada Apartments Inc., was before the court on voluntary and involuntary petitions[2] for reorganization under the bankruptcy act. The Judge's inquiry as to why the witness and another committee member (Mr. Tuttle) who were both employed by the City National Bank and Trust Company (which was former successor trustee),[3] had allowed themselves to

1. Claim filed on September 14, 1937. PR. (Printed Record) 82-83.

1-A. Sections 211 (11 U. S. C. A. S. 611) and 213 (11 U. S. C. A. Sec. 613) of the Chandler Act.

2. Filed in April of 1937.

3. PR. 79. Until possession was taken by the Federal Court Trustee on May 17, 1937.

be put on the committee, brought forth this answer. Mr. Sturm testified:[4]

> "Well, because of the fact we had the reorganization, and we were acting with other committees who served other trust companies' issues, because the Chicago Trust Company distributed forty per cent of this issue and we thought it was only proper and right that some of our personnel should act on this committee."

The Judge then asked:[4]

> "And the Chicago Trust Company had been absorbed by the National Bank of the Republic, and the National Bank of the Republic was absorbed by the Central Republic Bank and Trust Company, and the Central Republic Bank and Trust Company was absorbed by the Central Republic Trust Company and that was absorbed by the City National Bank and Trust Company, and the City National Bank and Trust Company was reorganized and it was transacting the business of the Central Republic Bank and Trust Company, is that correct?"

The witness replied:[4]

> "I don't think that is entirely correct, Your Honor. The City National absorbed some of the fixed liabilities of the other banks, and it did take over * * *."

The Judge then asked:

> "Now the City (National) was servicing the Central Republic Bank and Trust Company?"

To which the witness replied:[4]

> "It did service many of the trusts of the former banks * * *."[4-A]

Voluminous evidence equally damaging to all the respondents, was taken for a month in open court.

Background of the Record.

The court had appointed the petitioner at bar as Court Trustee of this Granada Apartments, Inc., which was an Illi-

4. PR. 202-203.

4-A. Another witness testified that:
"From the time the City National was organized * * * it serviced Central Republic Trust Company so far as trust service was concerned; City National took over Granada business." PR. 230-231.

nois Corporation with charter dated 1929.[4-B] The Court Trustee by order of the court had investigated the fee claims which were now on trial.[5]

The respondent Bondholders Committee had filed a claim for fees; and also for expenses of $2,285.21.[5-A]

Respondent City National Bank and Trust Company of Chicago had filed a proof of claim,[5-B] based upon services rendered in prior state court proceedings, which included a claim for solicitor's fees to Defrees, Buckingham, Jones and Hoffman, for legal services in the state court.

Respondent law firm, Defrees, Buckingham, Jones & Hoffman, for itself had filed a petition for allowance of counsel fees, claiming that they had done legal work for the committee.[5-C] This firm claimed a balance of $24,500[6] was due and owing to them, to be paid by the reorganization court, as fees for legal services. The firm had been paid $6,500 from Granada moneys by the other respondents, who ask approval for that payment.

For ten years prior to the filing of these claims the Granada property had been kept in court, with yearly increase of financial difficulties. These difficulties were evidenced by various litigations[6-A] with consequent expenses and delays in meeting creditors' demands. They were testified to by a member of the law firm which claimed the $24,500 fee balance.[6-B]

The District Court found that such litigations were started for the purpose of delaying, embarrassing and harassing creditors of the Granada estate,[6-C] and did so hinder, defraud and delay such creditors.[7]

4-B. PR. 776.
5. PR. 769-770.
5-A. PR. 82-83.
5-B. PR. 79-86.
5-C. PR. 151.
6. PR. 496.
6-A. See Appendix "A".
6-B. PR. 473-504.
6-C. PR. 785.
7. PR. 788.

The District Court found that the Bondholder's Committee was a mere department of the City National Bank;[7-A] that its membership represented adverse and conflicting interests; that it had taken no constructive action,[7-B] and as such was not entitled to a fee or expense allowance.[7-C]

Objections to these claims had been made by the Court Trustee,[8] asserting among other things that said state court by its decree refused to allow the claims of respondents, and that they are without equity.

Pleadings: Re City National Accounting.

Voluntarily on August 30, 1937, respondent City National Bank and Trust Company of Chicago filed in the reorganization proceedings its report and account as appointed indenture trustee,[9] to which the petitioner, Court Trustee, objected and made counterclaim[10] asking that certain items be surcharged. This counterclaim and objections urged (a) that respondent City National and its counsel had served conflicting and adverse interests in the state foreclosure proceedings,[11] and that they were not entitled to fees; the District Court after hearing evidence so found.[12] (b) That respondent City National had committed waste upon the Granada property,[13] and the District Court after hearing the evidence so found.[14] (c) That damages treble the amount of such waste should be assessed against respondent,[15] and the District Court so found.[16] (d) That respondent City National was a voluntary trustee *de son tort*, was liable for its acts, but had no

7-A. PR. 782-784.
7-B. PR. 783 and PR. 787-788.
7-C. PR. 794-795.
8. PR. 84.
9. PR. 111-126.
10. PR. 127-139.
11. PR. 127.
12. PR. 787-788; PR. 779; PR. 781.
13. PR. 128-129.
14. PR. 789-790.
15. PR. 129-130.

equity to claim payment for services,[17] and the District Court so found.[18] (e) That respondent City National failed to require a full accounting from its predecessor trustees, for which failure it should be surcharged[19] and held responsible for, and the District Court found that there had been numerous instances when the questionable dealings of prior fiduciaries (for a list of these "fiduciaries" see Appendix "B") should have been examined and accounted for,[20] and that (f) respondent City National itself and its attorneys (who had handled the Granada affairs for many years) knew of these transgressions of the law by these prior parties, but demanded no accounting and in some instances even aided and abetted the completion of illegal schemes and transactions commenced by prior fiduciaries, and that respondent should be held accountable for losses to debtor estate arising from such acts and failures to act.[21]

More particularly the objections and counterclaim of the petitioner stated that respondent and its counsel had wrongfully refused and failed to turn over certain Granada cash funds ($1,990.86) pursuant to court order of May 17, 1937,[22] and the District Court so found.[23]

The objections further charged that respondent in 1936 without authority had used Granada funds in the amount of $10,186, to pay court costs, fees and legal expenses never earned,[24] and the court so found.[25] That respondent as trustee in possession prior to May 1937, had over-

17. PR. 130.
18. PR. 789; R. 421, PR. 791.
19. PR. 132.
20. PR. 772-782.
21. PR. 781, Par. 36; PR. 778, Par. 26; PR. 779, Par. 28; PR. 787, Par. 48; PR. 773, Par. 14; PR. 774, Par. 16; PR. 775, Par. 20; PR. 776-77, Par. 23; PR. 777-778, Par. 24-25; PR. 780, Par. 32; PR. 781, Par. 35; PR. 782, Par. 37; PR. 785, Par. 44; PR. 788, Par. 50-51; PR. 789, Par. 54; PR. 789, Item 4.
22. PR. 133-134.
23. PR. 789, Item 3.
24. PR. 134.
25. PR. 789, Item 6.

charged for management fees[26] and the District Court so found.[27] That the costs of the present proceedings should be assessed against respondent and the court so found.[28] That respondent wilfully refused to pay certain current expense bills which it had incurred, due and owing from respondent to creditors, which bills necessarily had to be paid by petitioner to obtain continuance of utility and other services at Granada hotel,[29] and the court so found.[30] That by reason of collusive conduct in breach of fiduciary duties respondent City National Bank and Trust Company failed to charge Arlington, Inc., (a nearby hotel of which respondent City National was also trustee (see Appendix "C")); either the contract or fair and reasonable rate for heat, water and refrigeration services furnished by Granada, to the damage of the debtor estate in the sum of over $19,000 for which damages the respondent's account should be surcharged,[31] and the District Court so found.[32] That respondent as trustee of both Granada and Arlington by further breach of fiduciary duty and damage to Granada, paid valet commissions to Arlington, Inc., which commissions were earned by Granada rental space prior to May of 1937,[33] and the District Court so found.[34] That respondent by its neglect and in breach of its duty as trustee failed to make any effort to rent vacant space on lobby floor in the Granada property to the waste and damage of the debtor estate,[35] and the District Court so found.[36] Other breaches of trust conduct were also charged and found by the trial court.[37]

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26. PR. 134-135.
27. PR. 789, Item 5.
28. PR. 789, Par. 54 and Item 1.
29. PR. 136-137.
30. PR. 789, Par. 54.
31. PR. 137.
32. PR. 789, Par. 54 and Item 8 of R. 420, PR. 790.
33. PR. 138.
34. PR. 790, Item 7.
35. PR. 138.
36. PR. 790, Item 9.
37. PR. 789-790, Items 2, 4, 10.

The District Court ruled thus *against respondents:*

"By the decree December 18, 1936, the presiding Judge of the Superior Court refused to allow or consider any accounting of the funds." (Finding 30.)[40]

"The court finds that the claim No. 9 and all petitions by City National Bank and by the Bondholders Committee and its counsel for allowances shall all be denied, disallowed and dismissed for want of equity * * *." (Finding 58.)[41]

"That all petitions and claims for expenses and allowances by said City National, Bondholders Committee, and their attorneys and counsel, be now wholly disallowed and dismissed for want of equity." (Paragraph 2 of decree.)[42]

In the Circuit Court of Appeals.

Respondents filed in District Court a notice of appeal June 1, 1939; and also filed on June 12, 1939, a petition in the office of the Clerk of the Court of Appeals seeking an appeal by leave. These separate appeals were docketed as No. 7060 and No. 6986. Over objections by the Court Trustee, these two appeals later were consolidated by order October 4, 1939,[42-A] by the Seventh Circuit Court of Appeals. The appeals so taken by respondent City National Bank and Trust Company of Chicago, its attorneys and Committee, were taken from some findings of fact by the District Court, which findings were adverse to and against the respondents, and also from that part of the decree of the District Court which denied fees as trustee to City National and fees for its counsel, Defrees, Buckingham, Jones and Hoffman, and denied expense moneys to the "Bondholders Committee."

The assignment of errors for City National and associates, attacked only a small part of the findings, (see

40. PR. 779.
41. PR. 791.
42. PR. 794-795.
42-A. PR. 920-921.

below at Appendix "D") and attacked *only a few* paragraphs of the decree. The briefs for City National and associates, in the Circuit Court of Appeals argued *only part* of the findings mentioned by the assignment of errors, and argued only portions of the decree that were specified in their assignment of errors. Those findings and parts of the findings which stand uncontested by the "assignment of errors" which respondents filed[43] on June 12, 1939, are listed at Appendix "D". The legal effect of respondent's failure to assign and argue error to these findings, is to admit their accuracy and truth. Petitioner urges that the uncontested findings are sufficient to support the ruling against the respondents made by the District Court; and urges that Rule 52 of federal civil procedure forbids any reversal of any finding made in this record. Despite this record status, the Circuit Court of Appeals ordered the reversal of *all* the findings and the entire decree. Such action is outside the jurisdiction of any court of review.

This petitioner urged upon the Circuit Court of Appeals, that the pleadings and the findings disclosed in the record from the District Court, show such breaches of trust as to compel the disallowance of fees and expense monies to the respondents City National, the Bondholders' Committee and their counsel, pursuant to the applicable local law of Illinois and pursuant to federal law; and to require affirmance of those rulings by the District Court decree.

The theory of respondents was that (1) these breaches of trust did not occur or (2) if they did, respondents are still entitled to fees. Thus were issues drawn and settled in the District Court. The wrongs by the respondents as claimed by this petitioner, may be briefly outlined as follows:

(a) The representation, by City National, its law-

43. PR. 817-831.

yers and members of its Granada Bondholder's Committee, of Arlington, Inc., a competing hotel, not disclosed to Granada bondholders.

(b) The failure by City National, the Committee and their counsel to demand an accounting from predecessor trustees of Granada, despite the knowledge of City National, the Committee and the attorneys of wrongs committed by these trustees causing losses to Granada bondholders.

(c) The use by City National of its false Granada Bondholders' Committee, to represent to the District Court Judge that certain items (which were not debts against the Granada estate) should be provided for by the plan of reorganization, and ordered to be paid out of the debtor estate.

(d) The failure by City National to seek tenants and uses for the real property over which it asserted trusteeship, and its waste of the property and sundry income.

The opinion of the Circuit Court of Appeals[44] failed to express any moral or legal concern in regard to wrongs (a), (b) and (c). No sufficient fact analysis regarding these matters appears in the opinion. They remained undealt with. The opinion dealt only with contention (d) which was decided in respondent City National's favor. From this determination the court of appeals jumped to the conclusion that contentions (a), (b) and (c) should likewise be ruled on in favor of respondents. Orders were so entered by the Court of Appeals.[45]

Thus the Court of Appeals reversed entirely the trial court's findings and decree.

As is shown at page 38 of this brief the Appeals Court erred also in its determination of wrong (d).

Motions by Court Trustee to Dismiss.

The Court Trustee (petitioner) had made several motions before the Circuit Court of Appeals, to dismiss these appeals.[46] One reason assigned by the Court Trus-

44. PR. 955-969.
45. PR. 970-971.
46. PR. 887-895, 913-915, 925-941.

tee was on the ground that one of these appeals (7060) was taken as of right in violation of Section 250 of the Chandler Act and that the other appeal (6986) had not been perfected in accordance with Rule 73(g) of the Federal Rules of Civil Procedure. The Court of Appeals refused to grant these motions and entered orders denying them.[47] On June 22, 1940, the petitioner again made his motion[48] and also asked that costs be retaxed. This motion was denied by the court.[49] The entire question is discussed at Point IV of the argument in this brief.

On April 10, 1940, this petitioner filed his "Petition for Rehearing"[50] with the Circuit Court of Appeals. Respondent filed a curt answer[51] on April 20, 1940. The court denied the Petition for Rehearing on May 7, 1940.[52]

On October 14, 1940, writs of certiorari were granted by Your Honors.[53]

Assignment of Errors.

The Circuit Court of Appeals committed error in the following particulars:

(a) The Circuit Court of Appeals reversed findings of fact of the District Court which had not been assigned as error nor challenged by the respondents herein. (Appendix "D".)

(b) The Circuit Court of Appeals refused to decide these appeals upon the issues of fact and law as established by pleadings and proofs in the trial court, and by the assignment of errors and briefs in the Court of Appeals.

47. PR. 920-921, 953.
48. PR. 1013-1024.
49. PR. 1033.
50. PR. 973-990.
51. PR. 997-998.
52. PR. 999.
53. PR. 1038.

(c) The Circuit Court of Appeals deprived this petitioner of property without prior notice or hearing when it reversed all findings of the trial court on the basis of new law and facts not in issue in either court.

(d) The Circuit Court of Appeals in violation of Rule 52 of the Rules of Civil Procedure reversed and overruled the substantial findings of fact of the District Court, without analysis of evidence upon which those findings were based. The court discusses fragmentary testimony, counts noses, and seeks to weigh some evidence, contrary to any power possessed by such court of review.

(e) Many of the findings of fact made by the District Court upon hearing in open court without a reference, which are ignored, not mentioned or discussed in the Opinion of the Circuit Court of Appeals, are reversed by an omnibus order.

(f) The Circuit Court of Appeals orders expense monies and fees paid to a City National committee which, in violation of its fiduciary duty to the bondholders, had represented adverse and hostile interests without disclosing such facts to the bondholders or creditors. This despite the fact that any allowance of fees would be contrary to the express terms of the depositary agreement which specifies that there shall be no fees for the committee.

(g) The Circuit Court of Appeals orders fees paid to a bondholders committee, which had by pleading admitted that it did not take any constructive action in the reorganization of the debtor estate, but as shown by the record, had committed wrongs and injustices to said estate.

(h) The Circuit Court of Appeals orders fees paid to City National as former voluntary trustee, which in violation of its fiduciary duty to the bondholders and the debtor estate, had represented adverse and hostile interests without disclosing such facts to Granada owners.

(i) The Circuit Court of Appeals orders fees and expenses paid to City National as such trustee, who had by pleadings admitted that it had not at any time tried to have the prior fiduciaries perform their promises to the debtor estate or its bondholders, but had allowed statutes of limitation to run, and had itself committed wrongs and injustices to the debtor estate.

(j) The Circuit Court of Appeals orders fees paid to a firm of attorneys that had in breach of trust and ethics represented adverse and hostile interests without disclosure and consent, causing loss and detriment to the debtor estate.

(k) The Circuit Court of Appeals orders fees paid to a firm of attorneys, such trustee and such committee, all of whom had by pleading admitted that they had represented the former unfaithful fiduciaries, had tried to thwart and stay earlier Federal Reorganization proceedings, had represented adverse interests, and had committed many wrongs and injustices to the debtor estate.

(l) The Circuit Court of Appeals in violation of Section 250 of the Chandler Act asserted jurisdiction over an appeal for fees, which had been taken as of right by the filing of a notice of appeal in the District Court, and further erred in denying this petitioner's motion to dismiss such appeal and to retax costs.

(m) The Circuit Court of Appeals in violation of Section 73 (g) of the Rules of Civil Procedure, and contrary to said Section 250, and without power to enter such an order, allowed respondents motion to grant new time within which to file the record, and then without record being filed, ordered a consolidation with the adverse prior and competing appeal taken as of right by respondents.

(n) After the respondents had been eight days in default in completing appeal, they filed a motion to grant new time within which to file their record, and the Circuit

Court of Appeals erred in granting such motion, because by reason of the default the Court of Appeals had lost jurisdiction over the appeal.

(o) The Circuit Court of Appeals denied to petitioner an orderly proceeding adapted to the nature of the case. The procedure used by the Court of Appeals was not predictable under the prior rules and applicable statutes, but was so unreasonable arbitrary and capricious as to accomplish a destruction of the substantive rights of petitioner.

(p) Although the meaning of applicable rules and statutes was expressed in plain language not open to interpretation, the Circuit Court of Appeals makes an adverse and arbitrary application of said rules and statutes, contrary to judicial power and duty.

(q) The court erred in deciding the question of the jurisdiction and power of a bankruptcy court to review and readjust in a reorganization proceeding awards of fees made by a state court in a prior foreclosure proceeding. In the instant case the Seventh Circuit held that the Federal Bankruptcy Court had *no power* to disturb the state court award.

SUMMARY OF THE ARGUMENT.

In Response to the First and Second Questions Presented and to Assignments of Error (f), (g), (h), (j) and (k).

I.

BONDHOLDERS' COMMITTEES, TRUSTEES AND ATTORNEYS BEING FIDUCIARIES ARE BOUND BY THE LAW OF TRUSTS TO EXERCISE UNDIVIDED LOYALTY TO THEIR CESTUIS AND IF IN BREACH OF THAT TRUST DUTY SUCH FIDUCIARIES REPRESENT ADVERSE INTERESTS WITHOUT FULL DISCLOSURE AND CONSENT THEY ARE NOT, UNDER THE CHANDLER ACT, ENTITLED TO ANY ALLOWANCES.

Respondents having committed breaches of trust and having performed no beneficial services which can outweigh the detriment of such conduct were not entitled to fees and the bankruptcy court as a court of equity properly disallowed respondents' claims for fees.

Status as Fiduciaries:

Dickinson Industrial Site v. *Cowan*, 309 U. S. 382, 389 (1940).

Section 249 of the Chandler Act.

Canons 6, 32, 37 of the Chicago and American Bar Association.

Jackson, Receiver v. *Smith*, 254 U. S. 586, 588 (1920).

Duties as Fiduciaries:

Blaustein v. *Pan American Co.*, 174 Misc., 601, 21 N. Y. S. 651 (1940).

Weil v. *Neary*, 278 U. S. 160, 173 (1929).

Isenberg v. *Trent Trust Co.*, (C. C. A. 2) 31 F. (2d) 553 (1929).

Magruder v. *Drury*, 235 U. S. 106 (1914).

"The Law of Trusts and Trustees," Bogert, (1935), Vol. 3, Sec. 543, page 1730.

The Law of Illinois:

Nonnast v. *Northern Trust Co.*, 374 Ill. 248, 29 N. E. (2d) 251 (1940).

Metcalf v. *Metcalf*, 286 Ill, App. 10, 2 N. E. (2d) 760 (1936).

Lerk v. *McCabe*, 349 Ill. 348, 182 N. E. 388 (1932).

Chicago Title & Trust Co. v. *Schwartz*, 339 Ill. 184, 171 N. E. 169 (1930).

The Committee's Failure to Perform Its Duties as a Fiduciary:

The Record and Uncontested Findings of Trial Court as discussed in the argument.

Section 158 of the Chandler Act.

In Re National Lock Co., (C. C. A. 7) 82 F. (2d) 600, 603 (1936).

In Re Consolidation Coal Co., 14 F. Supp. 845, 855 (1936).

Steere v. *Baldwin Locomotive Works*, 98 F. (2d) 889, 892 (1938).

The Trustee's Failure to Perform Its Duties as a Fiduciary:

French v. *Commercial National Bank*, 199 Ill. 213, 65 N. E. 252 (1902).

Section. 4, Chapter 59, Illinois Revised Statutes, (1939).

The Record and Uncontested Findings of Trial Court as discussed in the argument.

The Lawyers' Failure to Perform Their Duties as Fiduciaries:

Magruder v. *Drury*, 235 U. S. 106, 113 (1914).

The Record and Uncontested Findings of Trial Court as discussed in the argument.

Under the Chandler Act a Bankruptcy Court Is a Court of Equity:

Continental Illinois National Bank v. *Chicago, Rock Island and Pacific Railway Company*, 294 U. S. 648 (1935).

Pepper v. *Litton*, 308 U. S. 295, 304 (1939).

Section 114 of the Chandler Act.

Section 2, Chapter II, of Bankruptcy Act.

Section 212 of the Chandler Act.

34 *Michigan Law Review*, 331 at 342-343 (1936).

Sitting as a Court of Equity the District Court Properly Disallowed All the Claims of Respondents:

Pepper v. *Litton*, 308 U. S. 295 (1939).

"The Law of Trusts and Trustees" Bogert (1935) Vol. IV, Section 979.

In *Re Perelstine*, (D. C. Pa. 1930) 44 Fed. (2d) 62.

In *Re De Ran*, 260 Fed. 732, 741 (1919).

Dissenting opinion in *U. S.* v. *Chicago, M., S. P. & P. Ry. Co.*, 282 U. S. 342 (1930).

Breach of Trust Charts: I, II and III.

In Response to the Third Question Presented and to Assignments of Error (a), (b), (c), (o) and (p).

II.

A CIRCUIT COURT OF APPEALS IS BOUND TO PROCEED IN ACCORD WITH THE PRINCIPLES OF DUE PROCESS OF LAW AND MAY NOT REVERSE THOSE FINDINGS OF THE TRIAL COURT WHICH WERE NOT CONTESTED NOR ASSIGNED AS ERROR.

When the Circuit Court of Appeals reversed findings of fact of the District Court, which findings had not been contested by respondents in their assignment of errors or otherwise, it violated due process of law because that action denied this petitioner notice, hearing and his day in court.

Fifth Amendment; Constitution of the United States.

Lutcher & Moore Lumber Company v. *Knight*, 217 U. S. 257 (1910).

Saunders v. *Shaw*, 244 U. S. 317 (1917).

Postal Telegraph Cable Co. v. *City of Newport*, 247 U. S. 464 (1918).

Morgan v. *United States*, 304 U. S. 1 (1938).

Morgan v. *United States*, 298 U. S. 468 (1936).

Uncontested Findings of the Trial Court, Appendix "D."

In Response to the Fourth Question Presented and to Assignments of Error (d) and (p).

III.

A COURT OF APPEAL CANNOT OVERRULE THE FINDINGS OF FACT OF THE TRIAL COURT WITHOUT FIRST HAVING ANALYZED THE EVIDENCE UPON WHICH THOSE FINDINGS WERE BASED.

The Circuit Court of Appeals committed error when in violation of Rule 52 of the Rules of Civil Procedure it reversed the findings of fact made by the trial court.

Rule 52 of the Federal Rules of Civil Procedure at 28 U. S. C. A., following Section 723c.

Dooley v. *Pease*, 180 U. S. 126 (1900).

"The Facts of the case as illustrated by respondents admissions of record in the pleadings" at Appendix "E."

In Response to the Fifth Question Presented and to Assignments of Error (l), (m), (n) and (p).

IV.

A CIRCUIT COURT OF APPEALS HAS NO JURISDICTION OF AN APPEAL TAKEN IN VIOLATION OF SECTION 250 OF THE CHANDLER ACT AND PRESENTED WITHOUT A RECORD HAVING BEEN FILED AS PRESCRIBED BY RULE 73(G) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Circuit Court of Appeals erred in not dismissing these appeals as requested by petitioner's motions, since appeals taken by the wrong manner do not confer jurisdiction.

Appeal 7060 Should Have Been Dismissed:

Section 250 of the Chandler Act.

Dickinson Industrial Site, Inc. v. *Cowan*, 309 U. S. 382 (1940).

Shulman v. *Wilson-Sheridan Hotel Company*, 301 U. S. 172 (1937).

Appeal 6986 Should Have Been Dismissed:

Rule 73(g), Federal Rules of Civil Procedure.

West v. *Irwin*, (C. C. A. 7) 54 Fed. 419.

The Four Reasons.

In Support of the Assignment of Error Q.

V.

A BANKRUPTCY REORGANIZATION COURT HAS JURISDICTION AND POWER TO DISALLOW FEE AWARDS WHICH HAVE BEEN MADE BY STATE FORECLOSURE COURTS.

The Circuit Court of Appeals erred in ruling that the Federal District Court had no power to readjust or review and disallow the fee awards of State foreclosure court.

Section 258 of the Chandler Act.

Pepper v. *Litton*, 308 U. S. 295, 302-311 (1939).

Butzel v. *Webster Apartments Co.*, 112 F. (2d) 362, 366 (1940).

ARGUMENT.

In Response to the First and Second Questions Presented and to Assignments of Error (f), (g), (h), (j) and (k).

I.

BONDHOLDERS' COMMITTEES, TRUSTEES AND ATTORNEYS BEING FIDUCIARIES ARE BOUND BY THE LAW OF TRUSTS TO EXERCISE UNDIVIDED LOYALTY TO THEIR CESTUIS AND IF IN BREACH OF THAT TRUST DUTY SUCH FIDUCIARIES REPRESENT ADVERSE INTERESTS WITHOUT FULL DISCLOSURE AND CONSENT THEY ARE NOT, UNDER THE CHANDLER ACT, ENTITLED TO ANY ALLOWANCE.

Respondents having committed breaches of trust and having performed no beneficial services which can outweigh the detriment of such conduct were not entitled to fees and the bankruptcy court as a court of equity properly disallowed respondents' claims for fees.

Status as Fiduciaries.

It has been generally held by courts throughout the United States that the status of a bondholders' committee is that of a fiduciary or trustee. Some courts have stated that the duties and obligations of such a committee are of an even higher fiduciary nature than those of directors of corporations[1] while other courts have compared their trust duties to those of promoters of a corporation.[2] Disregarding such comparative analysis however, all courts seem to agree that bondholders' committees and their members are fiduciaries and as such owe a high duty of trusteeship to their *cestuis que* trust—the bondholders.[3] The decisions

1. *Carter* v. *First National Bank of Pocahontas*, 128 Md. 581, 98 A. 77 at 80 (1916).
2. *Parker* v. *New England Oil Corp.*, (D. C. 1924) 4 Fed. (2d) 392.
3. *Monticello Bldg. Corp.* v. *Monticello Investment Co.*, 330 Mo. 1128, 52 S. W. (2d) 545 (1932).
   Bergelt v. *Roberts*, 144 Misc. 832, 258 N. Y. S. 905 (1932) affirmed 236 App. Div. 777, 258 N. Y. S. 1086.
   United Waterworks v. *Omaha Water Co.*, 164 N. Y. 41, 58 N. E. 58 (1900).
   Nichol v. *Sensenbremer*, 220 Wis. 165, 263 N. W. 650 (1935).

of the Supreme Court of Illinois are in accord and treat the committee as a fiduciary holding the legal title for the bondholder.[4] Your Honors have likewise referred to the fiduciary status of bondholders' committees and attorneys as recently as last March in the case of *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382 at 389 (1940), when the opinion's footnote stated that:

> "The fiduciary status of such claimants is expressly recognized in the Chandler Act, Section 249 provides in part:
>
> "'No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or *fiduciary capacity*[5] * * * who * * * has purchased or sold claims or stock * * *,' etc."

The District Court in the present case found it practicable to apply and did apply the Chandler Act to the proceedings at bar.[6] Respondents did not argue against such application of the Act in their briefs in the Circuit Court of Appeals.

The status of the attorney-at-law as a fiduciary is perhaps one of the most ancient. In addition to the recognition given this status by the Chandler Act, as above noted, the canons of professional ethics of the Chicago and American Bar Association emphasize the fiduciary nature of the attorney's status.[7] In the Roman Law the betrayal by an advocate of *his trust* for the benefit of the opposite party (a proevaricatio), was the worst breach of ethics that the lawyer was capable of.[8] Under Illinois law an attorney has always been considered a fiduciary.[8a]

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4. *Cushman* v. *Bonfield*, 139 Ill. 219, 28 N. E. 937 (1891).
   Babcock v. *Chicago Railways Co.*, 325 Ill. 16, 155 N. E. 773 (1927).
5. Italics supplied.
6. PR. 769.
7. Canon 6. "Adverse Influences and Conflicting Interests."
   Canon 37. "Confidences of a client."
   Canon 32. "The Lawyer's Duty in Its Last Analysis."
8. 5 Gluck. Pand. III, cited in Bouvier's at "Advocate" p. 156, Vol. 1, Rawle's Third Revision.

8a. *Goranson* v. *Solomonson*, 304 Ill. App. 80, 25 N. E. (2d) 930, 931-32 (1940).

An indenture or mortgage trustee assumes, as his title indicates, a high fiduciary status and as such he cannot place himself in a position where his interest *might* be antagonistic to the trust; such a course of action being illegal even though the trust res or estate was not actually injured by it.[9]

Thus it appears that all of the respondents, namely, the Bondholder's Committee, the attorneys and the former trustee, are fiduciaries and accountable as such.

Duties as Fiduciaries.

Loyalty to the beneficiary is the one absolute and indispensible characteristic of the fiduciary relationship. From this cornerstone of trust law springs the various other possible breaches of trust of which a fiduciary may be guilty. It is because this duty of loyalty *may* be jeopardized that the representation of possible conflicting interests by a fiduciary is abhorred and declared to be unlawful. Thus a New York Court in a recent case[10] in considering the problem of interlocking directorates has said:

> "* * * their *loyalties*[11] were obviously, in any event, divided. They were seeking to serve two Masters. That road of Service is hard to travel at anytime. It becomes impassable where the two Masters develop interests which conflict with each other."[11a]

This court has likewise spoken upon the subject as relating to bankruptcy attorneys[12] stating that the representation of *possibly* adverse interests tends to "produce the recognized abuses which follow fraud and *disloyalty* by agents and trustees." Although disloyalty may be caused by the self interest of the fiduciary, it can also be the

9. Opinion of Justice Brandeis in *Jackson, Receiver* v. *Smith*, 254 U. S. 586, 588 (1920).

10. Justice Rosenman in *Blaustein* v. *Pan American Co.*, 174 Misc. 601, 21 N. Y. S. (2d) 651 (1940).

11. Italics supplied.

11a. For a list of the "Masters Served" by the Respondents see pages 64-72 of this brief.

12. *Weil* v. *Neary*, 278 U. S. 160 at 173 (1929).

result of acting for a third person.[13] Thus if a fiduciary upon appointment already holds a position in which he has interests possibly hostile to the new trust, he should resign the inconsistent position upon accepting the trust unless a full disclosure of the adverse relationship is made to the beneficiary and his consent to continue in both positions is obtained.[14] If the cestuis are many and their whereabouts are unknown, so that disclosure cannot be made to them directly, then the necessary disclosure must be made to a court. In such a case "a trustee should have no secrets from a court of equity."[15] When the bondholders are widely scattered and are not in a position to individually protect their own interests the members of bondholders' committees and the mortgage trustees should be and are held accountable to the highest standards of "loyalty, fidelity and integrity."[16] This is particularly true with corporate trustees who seek this character of business claiming that they are "specially qualified" and financially responsible.[17] If a person joins with a fiduciary in a transaction in which he has reason to believe the fiduciary has

13. "The Law of Trusts and Trustees" Bogert (1935), Vol. 3, Sec. 543, page 1730:

"Service of Third Persons.

"The trustee is guilty of a breach of his duty of loyalty to the *cestui* not only when he permits his own selfish interest to intervene in the trust administration, but also where he acts as a representative for others than the *cestui* and thus allows the interests of third persons to be opposed to those of the beneficiary. He can be disloyal to his *cestui* just as much by seeking the advantage of a third person, as by looking to his own private aggrandizement. * * *"

14. *Isenberg* v. *Trent Trust Co.*, (C. C. A. 2d) 31 F. (2d) 553.

15. The court's complete quotation is:

"They may be performing their duties for the bondholders' welfare, but they are fiduciaries, and as such must account to equity. The assumption of a trust relationship implies a willingness and obligation to lay bare the stewardship * * * as regards the trust, a trustee should have no secrets from a court of equity." *Bergelt* v. *Roberts*, 144 Mis. 832, 258 N. Y. S. 905 at 910, (1932); affirmed 236 App. Div. 777, 258, N. Y. S. 1086.

16. *Monticello Bldg. Corp.* v. *Monticello Investment Co.*, 330 Mo. 1128, 525 S. W. (2d) 545 (1932).

17. *Harrison* v. *First Wisconsin Trust Co.*, 191 Wis. 23; 209 N. W. 945, 947.

In Re Clark's Will, 242 N. Y. S. 210.

Busby v. *First National Bank of Chicago*, 288 Ill. App. 500 at 520, 6 N. E. (2d) 451 at 459 (1937).

a conflict of interest, such person is jointly and severally liable with the fiduciary for any breach of trust which may result.[17a]

The Law of Illinois.

In Illinois the law relating to fiduciaries is in accord with the foregoing statements. Four cases[18] plainly illustrate the attitude of the Courts of Illinois and their application of firmly established rules relating to fiduciaries. The holdings of these cases may be summarized as follows:

(1) A Fiduciary is liable for failure to collect debts due the estate and must make the estate whole plus paying compound interest.[19]

(2) A Fiduciary who is guilty of a breach of his trust is not entitled to fees.[20]

(3) A Fiduciary owes the duty of making a full and complete disclosure to his beneficiary.[21]

(4) A Fiduciary acting also as an agent for an adverse third party breaches his trust and such a transaction is voidable regardless of whether or not the beneficiary was injured by the act and good faith of the fiduciary in the absence of a full disclosure is no defense.[21]

The Committee's Failure to Perform Its Duties as a Fiduciary.

The Granada Bondholders' Committee felt it had no duty to the bondholders, and translated that feeling into action. Its first *acts* of loyalty as shown by the testimony of respondents' own witnesses were always to third persons. It

17a. *Jackson* v. *Smith*, 254 U. S. 586, 589 (1920).
McGruder v. *Drury*, 235 U. S. 106 (1914).

18. *Nonnast* v. *Northern Trust Co.*, 374 Ill. 248, 29 N. E. (2d) 251 (1940).
Metcalf v. *Metcalf*, 286 Ill. App. 10, 2 N. E. (2d) 760, (1936).
Lerk v. *McCabe*, 349 Ill. 348, 182 N. E. 388, (1932).
Chicago Title & Trust Co. v. *Schwartz*, 339 Ill. 184, 171 N. E. 169, (1930).

19. *Nonnast* v. *Northern Trust Co.*, 374 Ill. 248, (1940).

20. *Edwards* v. *Lane*, 331 Ill. 442, 451, (1928).
Nonast v. *Northern Trust Co.*, 374 Ill. 248, (1940).

21. *Metcalf* v. *Metcalf*, 286 Ill. App. 10, 2 N. E. (2d) 760, (1936).
Lerk v. *McCabe*, 349 Ill. 348, 182 N. E. 388, (1932).
Chicago Title & Trust Co. v. *Schwartz*, 339 Ill. 184, 171 N. E. 169, (1930).

continually and persistently represented and was dominated by third parties whose interests were adverse to the interests of the bondholders. Its personnel and membership was chosen by City National for these illegal purposes. The members of the committee represented conflicting and adverse interests. These members were:

(1) *William G. Sturm*[22] who as an employee of City National[23] and formerly of the Central Trust Company[24] admitted that his status was "difficult to explain"[25] and said that the committee did "not concern itself very much with the operation" of the Granada;[26] that the committee and City National "were largely one and the same thing";[27] that "the committee cooperated with the trustee" in taking the bondholders' money to pay for the *Tuttle v. Harris* litigation;[28] that he was one of the committee and was in charge of the reorganization department at the trustee bank;[29] that "the bank furnished the committee" and then "became the depositary" and "*if there were any fees allowed the committee they go to the bank*" (City National);[30] that after City National formed the committee, the committee then filed a petition in the state court to have City National appointed as trustee;[31] that if his superior at the bank, a Mr. Leonard, had told him "to go to the committee and have City National Bank put in as trustee in that trust deed I would go and do it";[32] that the committee personnel for the hotels Arlington and Lincoln Park Manor "is composed entirely of people in the City National Bank";[33] that the committee did "not object to

22. PR. 201.
23. Respondent Trustee, PR. 201.
24. PR. 213.
25. PR. 202.
26. PR. 203.
27. PR. 205.
28. PR. 205-206. See Appendix "A" at page 93 below.
29. PR. 208.
30. PR. 210-211 and PR. 470.
31. PR. 212.
32. PR. 212.
33. PR. 213.

lawyer's fees;[34] that he didn't know the value of the property;[35] that he didn't know what the tax situation was from year to year;[36] that he knew the prospectus issued by the Cody Trust Company told the bondholders the furniture at the Granada was paid for, but he made no effort to have Cody Trust or its officers pay for it; the Committee borrowed money on a receiver's certificate to buy the furniture and didn't know if the furniture had been paid for twice;[37] that when the committee made an important decision only two or three members attended the committee meeting;[38] that the committee had no other office space except that of the City National Bank, which it occupied since its organization in April 1933;[39] that he executed the petition for charges by the committee,[40] but wasn't sure whether the items represented only transactions prior to the Federal reorganization proceedings or not, but thought that they did.[41]

(2) *Charles S. Tuttle* testified that he was a member of the Granada Bondholders' Committee,[42] that he was "a trust officer of City National", had "been there since the bank was organized on October 5, 1932", that prior to that he was Vice-President of the Central Trust Company which later consolidated with the Chicago Trust Company,[43] that he later joined City National,[44] that the Granada committee like "other committees in the bank" was formed by itself, "the men themselves got together and organized a committee",[45] that "I don't know that

34. PR. 214 and PR. 229.
35. PR. 220.
36. PR. 220.
37. PR. 225.
38. PR. 229-230.
39. PR. 469.
40. PR. 468.
41. PR. 470.
42. PR. 318.
43. Underwriter of Granada Bond issue. PR. 201.
44. PR. 317.
45. PR. 318.

there has been a petition filed here asking for expenses and fees of the committee in this proceeding."[46]

(3) *Lewis Riddle* did not testify but his affiliations were aptly described by other of respondents' witnesses. William Sturm testified that Riddle was a member of the Granada Bondholders' Committee,[47] that he had formerly been with the Cody Trust Company,[48] that many of the committee's earlier meetings had been held in Mr. Riddle's office at the Cody Trust Company,[49] that sixty per cent of the Granada Bond issue had been underwritten by the Cody Trust Company,[50] that "the bank (City National) appointed Mr. Riddle on the committee,"[51] that "Cody Trust or some people associated with it" controlled the Granada corporation stock in 1933,[52] that the committee made no effort to have the officers of Cody Trust Company pay for the receiver's certificate,[53] that *Mr. Riddle and Mr. Hiram S. Cody were on the indemnity bond together and that funds were taken from the Granada trust to pay off their obligations.*[54] Mr. O'Brien of the firm which acted as counsel for the committee stated in his testimony that "Lewis Riddle had given the surety company an indemnity agreement,"[55] and a receiver's certificate had been issued to pay that claim,[56] and that his firm had been paid $2,000 for counsel fees for conducting the litigation,[57] that the committee was set up with the cooperation of the Cody Trust Company,[58] that 1,000 shares of the common stock were then

46. PR. 319-320.
47. PR. 201.
48. PR. 201.
49. PR. 201.
50. PR. 201.
51. PR. 212.
52. PR. 220.
53. PR. 225.
54. PR. 229.
55. PR. 476.
56. PR. 479.
57. PR. 479.
58. PR. 487.

controlled by the Cody Trust Company,[59] that Cody Trust Company and Chicago Trust Company had advertised in their prospectus to the bondholders that the Granada furniture was part of the bondholders' security.[60]

(4) *Albert Peterson,* another member of the committee had also been with the Cody Trust Company.[61]

(5) *E. A. Kilmer,* the fifth member of the committee, was in the investment business in Indiana;[62] he had distributed a portion of the 60 per cent of the Granada Bonds which were probably the ones underwritten by the Cody Trust.[63]

(6) *The Committee Secretary,*[64] Witness Johnson, testified that he was employed in City National's Reorganization Division and had been with Central Republic,[65] that he is "Secretary of the various bondholders' committees for the issues underwritten by Central Republic and predecessor institutions. That includes the Granada issue,"[66] that the Granada Committee "was set up in April 1933" and a letter was sent out in May of 1933, asking for the deposit of Granada bonds,[67] that the bank's reorganization division made "recommendations to the committee",[68] that "I am secretary of the committee on Granada Hotel and for all of the other committees and all of the other reorganizations",[69] that "By 'we' I refer to the bondholders' committee and the Reorganization Division" of the bank,[70] that "we had com-

59. PR. 488.
60. PR. 499, Prospectus, Exhibit "V" at PR. 516.
61. PR. 201.
62. PR. 201.
63. PR. 203.
64. PR. 421-422.
65. PR. 421.
65. PR. 421-422.
66. PR. 422.
67. PR. 422.
68. PR. 422-423.
69. PR. 431.
70. PR. 431.

mittees on about 375 of the 400 issues that we handled",[71] that the comittee held only four formal meetings as shown by the committee's minute book,[72] that "the officers of the old Central Republic Bank and Trust Company employed the attorneys now representing the City National Bank in this proceeding. The committee had nothing to do with it. • • • *The committee had nothing to do with hiring those lawyers* • • •. The appeal in the Tuttle case was actually in the name of the committee • • • The Bank employed the attorneys in this case that went to the Supreme Court;"[73] that counsel advised the Committee to have the trustee intervene, and the Committee cooperated "in any way necessary;"[74] and that "I suppose you would call the Bondholders' Committees at the Bank self appointed Committees."[75]

Thus from the testimony of two of the committee members, the committee's secretary and its counsel we see that the committee did not hire the lawyers that represented the committee, that City National and the committee were one and the same thing, that the committee consisted of nominees and employees of City National, that this same condition prevailed with regard to the Arlington and Lincoln Park Manor Hotels to whom Granada sold heat and refrigeration, that the committee did not object to lawyers fees, that three of the members of the committee were connected with the underwriters[76] which had made false statements in the bondholders prospectus and which also owned common stock[76] in the debtor cor-

71. PR. 434.
72. PR. 435.
73. PR. 437. See Appendix "A" at page 93 below.
74. PR. 436.
75. PR. 437.
76. Section 158 of the Chandler Act expressly recognizes that stockholders and underwriters' employees and agents are not disinterested persons:

"A person shall not be deemed disinterested for the purposes of Section 156 and Section 157 of this Act, if—
(1) he is a creditor or stockholder of the debtor: or • • •
(3) he is or was within two years prior to the sale of the

poration, that only two or three members of the committee attended meetings, that one of the committee members didn't know that the committee had petitioned the court for fees, that if any fees were allowed to the committee that such fees would go to City National and not to the committee,[77] that one of the committee members, a Mr. Riddle, had signed an indemnity bond and that funds were taken from the debtor's estate to pay off that private obligation, that the committee used to meet in Mr. Riddle's office at the Cody Trust Company, that the City National Bank appointed the committee and then the committee petitioned for and secured the appointment of City National as depositary and trustee.

Petitioner submits that the committee served conflicting interests, did not take its job seriously, did not regard itself as a fiduciary, was under the domination and control of other private interests, that the presence upon the *bondholders' committee* of three representatives of the principal *stockholder* was a breach of trust and that the committee did nothing to benefit the estate of the debtor but was a mere tool for guilty parties intent upon hiding from the bondholders (the committee's *cestuis que* trust) the true facts of the situation which facts involved many breaches of trust and dishonest acts by prior fiduciaries against whom no remedy for the benefit of the bondholders was ever sought. The Chandler Act was adopted among other reasons in order to prevent breaches of trust

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filing of the petition, a director, officer or employe of the debtor or any such underwriter, or an attorney for the debtor or such underwriter; or

(4) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders."

77. Under such circumstances the claim should be disallowed on the authority of *In Re National Lock Co.*, (C. C. A. 7, 1936) 82 F. (2d) 600 at 603 and *In Re Consolidation Coal Co.*, 14 F. Supp. 845 at 855 (1936).

An additional reason why fees should be denied the Committee is that by Section 4, Article II of the Deposit Agreement (PR. 21) it is provided that *"The Committee shall serve without compensation. * * *"*

by such committees as the one now at bar. At least one court has spoken eloquently upon this subject.[78]

The District Court in the case at bar also spoke eloquently upon this subject,—and correctly. So correctly that the findings of the court as below quoted *were not assigned as error* by respondents. These findings thus admitted are in part as follows:

(1) "A prospectus was issued by Chicago Trust Company, and a separate one by Cody Trust Company. Both of these documents are in the record; the repeat the announcement made to the bondholders in 1924, that the security includes the furniture and fixtures at Granada Hotel."[79]

(2) "Having made the 1928 issue in this manner, the bankers used some of it to retire the 1924 issue, but did not pay off the furniture indebtedness."[80]

(3) "This Granada Apartments, Inc., from its beginning was officered by employees of Cody Trust Company, and was wholly under its control."[81]

(4) "When Central Republic * * * went into receivership, an order was secured on motion of Granada Bondholders' Committee to appoint City National * * * as * * * successor trustee."[82]

(5) "It had been organized in April 1933, by and among minor officers, employees and nominees of City National Bank and Trust Company."[83]

(6) "The committee when formed by City National included representation from Cody Trust Company.

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78. In *Steere* v. *Baldwin Locomotive Works*, 98 Fed. (2d) 889 at 892 (C. C. A. 3, 1938) the court said:

"The history of corporate reorganizations before the adoption of Section 77B reveals too many instances of committees, often self constituted, founded ostensibly to protect security holders, but actually serving their own or other private interests at the expense of those they were appointed to serve. One of the purposes of the Bankruptcy Act as amended is to assure such security holders that, so far as the court is able to ascertain after hearing, any committee permitted to intervene in their behalf is composed of able and honest individuals who are free of conflicting interests and reasonably representative, and may, therefore, reasonably be expected adequately to protect their interests."

79. Paragraph 16 at PR. 774 and at paragraph 26, PR. 778.

80. Paragraph 22 at PR. 776.

81. Paragraph 23 at PR. 776-777.

82. Paragraph 33 at PR. 780-781.

83. Paragraph 34 at PR. 781.

> * * * The minutes produced in this court to show what action was taken by the Granada Committee, do not show that any constructive action was ever taken looking toward a reorganization of the Granada property."[84]

Other findings by the trial court to which respondents did assign error were that "This bondholders' committee had no will of its own",[85] that "City National and its alter ego, Granada Bondholders' Committee entered into possession and engaged in various dilatory litigation, in Superior Court, County Court, this Court and Courts of Review (269 Ill. App. 489), (297 U. S. 225)"[85] that "The Committee has been at all times dominated and controlled by City National",[86] that "In the minds of City National witnesses there was no distinction between the Committee and the Reorganization Division of the City National, and their witnesses could not distinguish the expenditures by the committee from expenditures by City National as Trustee. * * * The same individuals who used their personal names to persuade the public to deposit bonds, were the persons who handled the business for City National after it had become depositary, or fiduciary in some other capacity. The trust relationship was treated as a business to be obtained and conducted like any other commercial operation obtained by ingenious form of advertising,"[87] that "If the properties[88] were not to be operated as a single unit but as antagonistic units, it was highly improper for the committee or City National or counsel to continue to represent more than one of them. *A continuance of said representation at all times was a breach of trust which alone disentitles counsel or committee or City National to any compensation for services to*

84. Paragraph 40 at PR. 783.
85. Paragraph 34 at PR. 781. See page 93 below.
86. Paragraph 40 at PR. 783.
87. Paragraph 41 at PR. 783-784.
88. Granada, Arlington, Lincoln Park Manor.

Granada."[89] That "Neither the attorneys, nor the committees which have an interlocking personnel, nor the City National as Trustee, could rightfully continue a common relationship to all these properties once this adverse interest was disclosed."[90]. The court also found:[91]

> "The record does not disclose that any information ever was given to the bondholders or creditors of Granada, about the receiver's certificate, or any moneys used in furniture litigation; or that the City National as Trustee and the Bondholders' Committee and the Attorneys, occupy similar relationships to the Arlington property, and to Lincoln Park Manor property; nor does it appear that any bondholder or creditor knew that the Granada Bondholders' Committee was merely a business getting device for City National without a will of its own; nor does the record show that any bondholder or creditor of Granada knew that City National and the Bondholders' Committee were employing said attorneys who had formerly represented adverse interests and currently were representing adverse interests. Continuously since the Committee was organized in 1933 these adverse situations of interests have existed and were fully known to the Committee, to the City National, and to said counsel, all of whom have committed breaches of trust in failure to make full disclosure and failure to resign from all but one of said relationships. *The breach of confidence thus in evidence is so fundamental as to destroy all right for any of these parties to have compensation or reimbursement for any services.*"[92]

Petitioner submits that by the testimony of respondents' own witnesses these contested findings of the trial court are amply and substantially supported by the evidence and further that these contested findings are additionally supported by those uncontested findings of the court which were admitted by respondents' failure to assign as error in the Circuit Court of Appeals.

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89. Paragraph 42 at PR. 784.
90. Paragraph 49 at PR. 787.
91. Paragraph 50, PR. 788.
92. Italics supplied.

The Trustee's Failure to Perform Its Duties as a Fiduciary.

The breaches of trust committed by City National Bank and Trust Company as former trustee were many. While trustee of Granada, they were also trustee of nearby hotels which contracted with Granada for services. As trustee of one it "bargained" with itself as trustee of the other. All of these facts stand admitted in the record by the testimony of City National's own witnesses. Not only did City National represent conflicting interests without disclosure and consent, but they failed to perform their duties to Granada even when a conflicting interest was not present to prevent them from so doing. The testimony of City National's witnesses tells the story in a rather complete manner as follows:

(1) Witness *Hubbart* described himself as City National's agent in charge of Granada[95] and said that "at the same time I was operating the Arlington property;"[96] that "during the period I have operated this hotel (Granada) I collected from the Arlington property across the street for heat and hot water and refrigerator service $600 a month. I did have something to do with determining that sum of money. I objected to it from a fair standpoint when I found the Arlington paid as much as they did,"[97] that "the amount of $4,080 of accumulation for 1933 was not paid" (from Arlington to Granada) "they refused to pay"[98] that "Lincoln Park Manor is a trust with the City National covering Lincoln Park Manor Hotel. * * * There is also a trust in reference to the Arlington Hotel."[99] In reference to the Granada and Arlington Bondholders' Committee's membership, Mr. Hubbart said, "* * * some were on both committees," and then

95. PR. 173.
96. PR. 177 and PR. 181.
97. PR. 177.
98. PR. 181.
99. PR. 400.

added, "Not all of the members of the committee were officers of the bank."[100] At the beginning of his testimony this witness had stated that he did not make any effort to get any permanent tenant for the ballroom space in the debtor's lobby.[101]

(2) Witness *Bickel* said that he was a trust officer of the City National, had been connected with it since its organization in 1932 and prior to that time had been with the Central Republic Trust Company.[102] He further testified that "I knew about this reduction of charge for the services to the Arlington from $940 to $600.[103] * * * at that time the Central Republic Trust Company was trustee under both mortgages."[104] He next indicated that so far as this trust was concerned there was no difference between City National and Central Republic by saying, "The City National Bank and Trust Company of Chicago began furnishing service for the Central Republic at the time the Central Republic went into possession.[105] *When the City National Bank took over this property formally on the record, in January 1935, the same personnel took it, doing the same thing.* We knew that the accounts of the Central Republic Trust, which was formerly *on record* were correct. *I don't know what more checking we could do than prepare them.*"[106] The witness then said, "I am not a member of the Bondholders Committee on the Granada. I was on the other two.[107] *My company* was trustee in all three,"[108] that "I know something about the item of $4,080.00 on the books of the Granada Hotel which was *charged off* at the end of 1933. * * * I think it was done

100. PR. 178-179.
101. PR. 176.
102. PR. 183.
103. PR. 183.
104. PR. 184.
105. PR. 195.
106. PR. 196.
107. The Arlington and Lincoln Park Manor.
108. PR. 184.

at the direction of the corporation, which at that time was subject to Edward Hall's direction. * * * At the time the bank took possession of the Granada, he was retained as agent for the Trustee"[109] and that "at the time we took possession as Trustee, the Chicago Title & Trust Company was not operating the property directly. They had stated that they would prefer to, but at that time *we were operating it through Mr. Hall.*"[110]

(3) *William G. Sturm* stated that he was a trust officer of City National and that he had contact with the Granada property,[111] that "I did know that this Granada hotel furnishes hot and cold water, heat and refrigeration to two other hotels",[112] that "My best recollection is the Arlington and Lincoln Park Manor, that the committee personnel is composed entirely of people in the City National Bank",[112] that he had been "in the real estate loan department of Central Trust Company,[112] that he hadn't checked the taxes on Granada,[113] that he didn't know how much it was worth within $50,000.[114]

(4) Witness *Leonard,* testified that he was "Vice-President in charge of the Trust Department of City National",[115] that "*From the time the City National was organized down to the time that is known as the termination date, it serviced Central Republic Trust Company so far as trust service was concerned;* City National took over the Granada business. I have known about this situation generally since the Central Republic went on the record in this matter,"[116] that "The trustee was appointed on a petition filed by the Bondholders' Committee * * * *The*

109. PR. 333.
110. PR. 417.
111. PR. 201.
112. PR. 213.
113. PR. 220.
114. PR. 220.
115. PR. 230.
116. PR. 230-231.

two active members of that committee are *junior* employees of the City National."[117]

(5) *Philip R. Clarke* said, "I am the President of the City National Bank and Trust Company,"[118] that "I have heard that a previous case dealing with Granada was carried to the Supreme Court of the United States *by the committee who were officers of my bank,*"[119] and that "Nothing pertaining to the Granada matter has ever been before the Board of Directors that I recollect."[119]

(6) Witness *McDonnell* was an expert called by City National who said he was "General Manager of the Hotel Windemere."[120] He further stated as follows:

> "The solarium and writing room in the Granada could be utilized for commercial purposes with the qualifications that I made. That is that the right type of person and a going enterprise"[121] and that "I think I would endeavor to make some use of that space to bring in some money."[122]

(7) Witness *Hall*, whose testimony is perhaps more interesting and informative than that of any other of City National's witnesses, said: "I * * * am familiar with the Granada, Arlington and Lincoln Park Manor properties * * *. In December, 1933, Chicago Title and Trust Company took possession of the Granada, as receiver, and I was agent in charge for the receiver."[123] "Around that time I had conferences with Mr. Hertzman and others of City National, relative to charges being made for heat, refrigeration and other services from Granada to Arlington. At the conclusion of those discussions an instrument was prepared * * *"[123] "*The instrument was prepared*

117. PR. 239.
118. PR. 335.
119. PR. 336.
120. PR. 378.
121. PR. 384-385.
122. PR. 385.
123. PR. 402.

by you[124] at my suggestion, I think. That was on or about the date it bears, January 4, 1934." [125] *"I was operating both of the properties at that time*[126] on behalf of the trustee of the Arlington and on behalf of the receiver of the Granada, who was Chicago Title & Trust Company. I was doing the actual work of operating. The receiver did not operate at all * * *. I have been in there since December of 1931." [127] "In addition to myself we had the Manager; aside from the Manager there were lawyers. *Aside from the lawyers and myself, nobody did anything. That existed in reference to the Granada until the matter came into the Federal Court in May of 1937."* [128] "So that this arrangement of $600 a month for 1933 was simply *an evening up measure* * * *." [128] "The $900 a month was collected for the entire calendar year 1931, and the calendar year 1932. In 1933 *we adjusted matters* and collected $600 for the entire service. We began that in January 1933. Pending the consummation of the agreement, we charged the building with the full amount and collected each month $600 *and let the balance ride. That was written off at the end of the year by a journal entry."* [129] "I traded that contract[130] on behalf of the Arlington. I was in charge of that building as well. It was not in the hands of a receiver. No one else than myself tried to get as much money as he could for one side and as little for the other side." [131] "I never sought * * * the consent of anyone to utilize the space in the Granada for commercial purposes and for dining room purposes." [132] "It is quite true

124. Mr. Vincent O'Brien of Defrees, Buckingham, Jones & Hoffman, counsel for the Granada Bondholders Committee and City National as Trustee of Granada.

125. PR. 402.

126. When the new "contract" for services was prepared.

127. PR. 403.

128. PR. 404.

129. PR. 405-406

130. The new contract which reduced Arlington payments from $900 to $600 per month.

131. PR. 406.

132. PR. 408.

that *there wasn't any other reason for that receivership except to use it as a weapon in warfare with Pick.*[133] In 1934 the Chicago Title and Trust Company was directed to actually take possession because Mr. O'Brien,[134] myself and the trustee thought that the best move would be to make *a conventional receivership out of it*[135] and this was done." [136]

(8) Witness *Johnson* also was an employee of City National and had formerly been employed by the Central Republic Trust Company,[137] and testified that "we were also very active on the Arlington (hotel) situation".[138]

(9) Witness *Hertzman* said he "was associated with Central Republic Trust Company in 1933. I am at present with the City National." [139] He testified that he had written a letter to City National urging a reduction in the amount of the payments made by the Arlington Hotel to the Granada and "I understand that as a result of this letter *they made a charge-off in January of 1934 of $4,080.* I understand that it was for billing that had been done and put on the books in 1933." [140]

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133. Albert Pick & Company, the furniture creditor.

134. Mr. Vincent O'Brien of Defrees, Buckingham, Jones and Hoffman.

135. Since this evidence shows that the only reason for the state court receivership was to delay and defraud a creditor, *i. e.*, Albert Pick & Company, counsel as a fiduciary cannot, under well established Illinois law claim compensation for services, nor can the receiver. In *French* v. *Commercial National Bank*, 199 Ill. 213, 65 N. E. 252 (1902) the court said:

> "The complaint of the appellant that he was allowed no compensation for his services as 'trustee' as he styles himself * * * hardly demands discussion. The law does not award compensation for the doing of illegal acts, and does not recognize that anyone is entitled to recompense for services rendered in furtherance of a conspiracy to wrong and defraud creditors."

Section 4 of Chapter 59, Illinois Revised States, 1939 provides:

> "Every * * * charge upon any estate real or personal, or right or thing in action * * * *made with intent to disturb, delay, hinder or defraud creditors* or other persons and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons."

136. PR 411.

137. PR. 421.

138. PR. 429.

139. PR. 295.

140. PR. 304.

(10) Witness *O'Brien,* a member of the firm which represented the trustee and the Bondholders' Committee,[141] next testified. He admitted that his firm, Defrees, Buckingham, Jones & Hoffman had formerly represented "its predecessor in trust, Central Republic Trust Company[142] * * *" and that when Central Republic got its discharge and release and City National was appointed in its stead "we later appeared in court on the presentation by the receiver of the account of the Central Republic Trust Company."[143] He did not indicate whether he appeared as counsel for City National and the committee or for the Central Republic who received a full and complete discharge and release from all liability. He testified that for defeating the Federal Bankruptcy Court's jurisdiction "we were paid by City National Bank and Trust Company the sum of $3500 on April 13, 1936 * * *."[144] He then tried to explain what had happened to $120,000 worth of furniture which had been at the Granada. As counsel for the trustee he should have known. He said, "I have a pretty good notion of what became of the $120,000 worth of furniture. The inventory made in 1933 which fixed the value of the furniture at the Granada at $40,000 after having spent $35,000 in replacing it, depreciated the value of the stuff in the place at that time, as those appraisers saw it, about forty-three or forty-four thousand in 1933"[145] which meant he didn't know or didn't want to tell. Speaking of the foreclosure in the state court, he said, "There is no question but what we spent six and a half years, from June 1930 to December 1936."[146]

In view of this testimony by City National's own witnesses, it is not surprising that the trial court made cer-

141. PR. 473.
142. PR. 473.
143. PR. 482.
144. PR. 484. See page 93 below.
145. PR. 497.
146. PR. 502.

tain findings which respondent City National did not have the temerity to assign as error. These findings which were admitted by the foregoing testimony and which stand upon the record as uncontested by any respondent, are as follows:

(1) "Albert Pick & Company of Chicago supplied the furniture on open account and chattel mortgage * * * what became of that much furniture is not shown by the record."[147]

(2) "* * * a copy of the prospectus * * * specifically states that the furniture and fixtures at Granada are a part of the security for the bondholders' money * * *."[148]

(3) "It does not appear that City National or anyone tried at any time to have the Codys or the Cody Trust Company or its officials, or the Chicago Trust Company, or its officials, or any successors or receivers for them, or Wenstrand and the other indemnitors on the court bonds that were released by buying the Pick furniture the second time with bondholders' money, and buying new furniture from La Salle Furniture and Supply Company when Pick & Company took away part of the furniture, to have any of these persons perform their promises and duty to the Granada property and the Granada Bondholders."[150]

(4) "At that time (March of 1934) until the Central Republic Trust Company went into receivership near the end of 1934, the City National Bank and Trust Company furnished the personnel and service on the trusts including the Granada matter, as to which the Central Republic Trust Company was nominal trustee."[151]

(5) "It is admitted by the pleadings and in evidence here that Mr. Hall was so retained to represent and keep informed the Cody Trust Company and their successors in interest."[152]

(6) "The Committee when formed by City Na-

147. PR. 773, paragraph 14.
148. Paragraph 11, PR. 772 and Paragraph 26 at PR. 778.
150. Paragraph 36, PR. 781-782.
151. Paragraph 33, PR. 780-781.
152. Paragraph 35, PR. 781.

tional included representation from Cody Trust Company."[153]

(7) "City National was trustee of both Arlington and Lincoln Park Manor."[154]

(8) "Neither the attorneys nor the Bondholders' Committee, nor the City National presented any plan at any time to the bondholders or anyone else for the joint operation of the three properties * * *."[155] From that time (May of 1929) until now these properties were bondholders equities. *No person in a confidential relationship to one of these properties could rightfully represent another.*"[156]

(9) "*The court* does not intend to minimize, but *does recognize the many wrongs and injustices to the debtor estate shown by this record which have been committed by City National*, by the Bondholders' Committee and by their attorneys and counsel; the court finds that *all equities are with the Court Trustee*; but the court believes that justice to all concerned will be rendered more speedily if the opposing claims and contentions are set off against each other * * *."[157]

In the last paragraph of the court's findings above quoted, the trial court refused the fee claim of City National and of the other respondents and yet respondents at no time contested this part of the finding by assigning error to it.[158] Thus it stands admitted. The preceding findings, also above quoted, and also not contested, amply support the conclusion there reached. It is therefore difficult for this petitioner to realize upon what basis or proposition of law City National proceeded when it suddenly claimed in the Circuit Court of Appeals that the District Court had erred in disallowing its claim for fees.

The witnesses of City National openly admitted the facts which constituted the many breaches of trust. The trial court found City National guilty of breaches of trust and

153. Paragraph 40, PR. 783.
154. Paragraph 39, PR. 783.
155. Granada, Arlington and Lincoln Park Manor.
156. Paragraph 49, PR. 787-788.
157. Paragraph 57, PR. 790-791.
158. Respondents' assignment of errors is at PR. 817-832.

not entitled to fees. City National did not assign error to those portions of Findings 1 to 9 above quoted.

Errors were assigned to other findings of the District Court however. These findings were, nevertheless, supported by substantial evidence included within the admissions made by City National's witnesses. These additional findings of the trial court were:

(1) "Instead of reorganizing three properties as a unit of resigning from two of the trusts, City National officials at the beginning of 1934 consummated a course of action which had been planned for a year by charging off a balance of Four Thousand Eighty Dollars ($4,080) that had been regularly billed to Arlington, and placed upon the Granada books of account, for the heat, hot and cold water and refrigeration services furnished by Granada during the year 1933. The charge (of which said sum is the unpaid balance) was made pursuant to the Barton Contract."[159]

(2) "This deliberate purpose to favor the Arlington as against Granada by the reduction in charge, forcibly made, is an additional breach of trust * * *."[160]

(3) "The reasonable value of the heat, hot and cold water and refrigeration service which have been rendered to the Arlington Hotel property until there was a wilful cut-off of pipes by respondents * * * is found to be at the rate of one thousand dollars ($1,000) per month."[161]

(4) "The purpose and effect of this attempted reduction was to enable the Arlington between 1933 and the present time to pay off entirely its taxes, and to leave the Granada with a tax bill of about Sixty Thousand Dollars ($60,000) when these proceedings were begun. At the same time that this was done, the former rate of compensation paid by Lincoln Park

159. Paragraph 42 at PR. 784. This finding was supported by the following of respondent's witnesses:
(1) I. Ray Hubbart at PR. 181;
(2) John J. Bickel, Jr. at PR. 333;
(3) Edward Hall at PR. 402, PR. 404 and PR. 405-406.

160. Paragraph 43 at PR. 785.

161. Paragraph 53 at PR. 788-789. This finding is substantiated by the testimony of William H. Schott, PR. 250-257 and of Walt Reynolds Loveless, PR. 443-450.

Manor was continued and collected without change by respondents and City National as its trustee; and is being paid today by a lessee of that hotel."[162]

(5) "*From October, 1932, the City National assumed and exercised real control over Granada affairs.*"[163]

(6) "If the properties were not to be operated as a single unit but as antagonistic units, it was highly improper for the committee or City National or counsel to continue to represent more than one of them. A continuance of said representation at all times was a breach of trust which alone disentitles counsel or committee or City National to any compensation for services to Granada."[164]

One of respondents' witnesses[165] testified that, "aside from the lawyers and myself, nobody did anything. That existed in reference to the Granada until the matter came into the Federal Court in May of 1937."[166] We have already seen what this witness did.[167] Let us now see what the lawyers did.

The Lawyers' Failure to Perform Their Duties as Fiduciaries.

Defrees, Buckingham, Jones and Hoffman, who style themselves as "counsel for City National * * *, as trustee * * *, and also for the first mortgage bondholders' committee[168] * * *" requested "a present net allowance of $24,500."[169] This "firm" was represented throughout the proceedings in all courts by Mr. Vincent O'Brien,

162. Paragraph 43 at PR. 784-785. This finding is fully supported by the evidence as follows:
(1) Arlington tax situation, PR. 186 and PR. 180;
(2) Lincoln Park Manor tax situation, PR. 219;
(3) Granada tax situation, PR. 190.

163. Paragraph 33 at PR. 780. This finding is supported by the testimony of respondents witnesses at PR. 195-196, PR. 201, PR. 211, PR. 230-231, PR. 422.

164. Paragraph 42, PR. 784.

165. Edward Hall.

166. PR. 404.

167. Pages 38 to 40, this brief.

168. PR. 473.

169. PR. 496.

who was also their only witness.[170] Mr. O'Brien did not tell the full story (it may be pieced together only from the testimony of the other witnesses), but the installment which be contributed to the serial (even now incomplete) was an interesting chapter. It showed employment about Granada affairs for a period of thirteen years,[171]—a length of time which represents a large proportion of the average lawyer's professional career—a number of years which carried his firm back to 1924 when credulous Americans who believed in underwriter's statements first purchased the Granada bonds.

Mr. O'Brien admitted that "prior to the appointment of the City National • • • as successor trustee, we represented its predecessor in trust, Central Republic Trust Company, formerly known as Central Republic Bank and Trust Company."[172] He also testified that "we later appeared in court on the presentation by the receiver of the account of the Central Republic Trust Company • • •"[173] It was at this time that Central Republic was "discharged from any and all liability" for its conduct in the Granada matter[174] and yet the bondholders and its committee and the new trustee were there represented by the lawyers of the accounting fiduciary who received its discharge. Small wonder that no one objected to the discharge, release or accounts of Central Republic. No one was in court whose interest was not akin to that of the departing trustee; its lawyers were the lawyers of the only persons qualified to object. But this firm's representation of adverse and conflicting interests does not stop here. This was only an introduction,—a beginning. Even Mr. O'Brien's story does not stop here, for he says "I think we were acting for the Chicago

170. Testimony of Mr. O'Brien PR. 473-504.

171. PR. 496.

172. PR. 473.

173. PR. 482.

174. PR. 958, where the opinion of the Circuit Court of Appeals states this. Respondents admit that this is correct at PR 998 when they say that in the opinion *"no points have been overlooked or misapprehended."*

Trust Company as its general counsel."[176] Chicago Trust Company with Cody Trust Company were the underwriters of the two Granada bond issues; it was the Chicago Trust Company, this firm's client, who had issued a fraudulent prospectus[177] which stated that the Granada furniture was additional security for the bondholders when as a matter of fact and truth, the furniture was not owned by Granada, but had been obtained on a chattel mortgage. Mr. O'Brien testified to this for he said, "I think both the Chicago Trust Company and Cody Trust Company advertised in their circulars this furniture was part of the security sold to bondholders."[178] And he also knew the implication of this fraud and said "I do not say that there was not an existing cause of action against perhaps the Cody Trust and the Chicago Trust. I put a period there."[179] But he "put the period" too late. He had already shown his recognition of the extent of the double fraud. He knew that $120,000 worth of furniture that Granada was obligated to pay for had almost wholly disappeared and could not be found. He said, "I would not be surprised if you told me those financial records showed charges by Pick & Company against Granada, the old company and the new company, amounting to $120,000. I never considered the question from the standpoint that *$120,000 worth of furniture must have been distributed among other places than the Granada itself.*"[180] The conclusion to be drawn is simple. This law firm knew that the debtor and its bondholders had causes of action against their clients, but they became the attorneys for

176. PR. 497.
177. PR. 499, 497.
178. PR. 499.
179. PR. 499.
180. PR. 497. In an attempt to explain this away he said a moment later: "I have a pretty good notion of what became of the $120,000 worth of furniture. The inventory made in 1933 which fixed the value at $40,000 after having spent $35,000 in replacing it, depreciated the value of the stuff in the place at that time, as those appraisers saw it; about forty-three or forty-four thousand in 1933."
Net Loss—$115,000.

the only persons who could prosecute such actions, *i. e.*, the trustee and the bondholders' committee. This disloyalty is reprehensible. Further admissions were made by Mr. O'Brien. He testified that his firm and rendered an opinion of Granada's title in 1924,[181] and that "I think it is substantially so that in 1929 we did handle the set up of the Granada Apartments, Inc., and the transfer from the old corporation. The legal work was handled in our office."[182] He did not state who his firm was representing when it did this work in 1924 and 1929. Mr. O'Brien admitted that his firm spent seventy-eight months[183] in the state court foreclosure proceeding. In the absence of any other satisfactory explanation of such a delay, it is reasonable to presume that this delay was for the purpose of allowing the statute of limitations to run for the protection of the former unfaithful Granada fiduciaries, who were clients of his firm. Mr. Wenstrand, according to Mr. O'Brien, was one of these clients.[184] Mr. Wenstrand and others were indemnitors on certain surety bonds to Albert Pick & Company and Mr. O'Brien admitted it.[185] City National and its bondholders' committee obligingly paid off Mr. Wenstrand's debt out of the bondholders' money,[186] and no one embarrassed Mr. Wenstrand by asking him to pay his own obligations.[187] For which Mr. Wenstrand was undoubtedly very grateful to these, his lawyers.

A portion of the claim of his firm which Mr. O'Brien tried to prove up as lawyer-witness was for legal work done for the Granada Bondholders' Committee. In this regard Mr. OBrien said: "* * * we were employed by the Com-

181. PR. 496.
182. PR. 497.
183. PR. 502.
184. PR. 503.
185. PR. 496.
186. PR. 229-230. This payment was aided by the fact that one of Wenstrand's co-indemnitors, Mr. Riddle, was a member of the Granada Bondholders' Committee. PR. 20
187. PR. 225.

mittee."[187a] But what did the Committee say about this? Arnold M. Johnson, one of respondent's witnesses who said he was Secretary of the Granada Committee,[188] testified as follows:

> "The officers of the old Central Republic Bank and Trust Company employed the attorneys now representing the City National Bank in this proceeding. *The Committee had nothing to do with it.* The Central Republic Bank and Trust Company employed the attorneys in the case of Harris against Tuttle, which went to the Supreme Court.[189] *The Committee had nothing to do with hiring those lawyers* * * * The appeal in the Tuttle case was actually in the name of the Committee."[190]

This witness had already testified that "the Committee took the action to have the trustee intervene, *just why counsel advised that I don't know,* but that was the mechanics * * * the Committee would cooperate in any way necessary."[191] This was the same witness which Mr. O'Brien had so much confidence in that he named him as a supporting authority for the things which he (Mr. O'Brien) was telling the court.[192]

From Mr. O'Brien's testimony, it would seem that he and his firm also represented the additional conflicting interests of the Cody Trust Company, for he said, "* * * Hiram Cody was able to persuade McKieth[193] that the Pick mortgage was invalid and no good, and *he had the attorneys* who could establish its invalidity."[194] There can be no doubt but that Cody's attorneys as thus referred to were, Defrees, Buckingham, Jones & Hoffman, for Mr. O'Brien testified that his firm spent 650.9 hours on the Pick furni-

187a. PR. 487.
188. PR. 421-422.
189. 297 U. S. 225 (1936).
190. PR. 437. See Appendix "A" at page 93 below.
191. PR. 436.
192. PR. 487.
193. A Vice-President of the Chicago Trust Company.
194. PR. 499.

ture litigation in the state court[195] and although "that litigation was not successful"[196] they were paid $2,000 for it.[197] Thus we see that the law firm represented the party owning and controlling Granada's common stock[198] although it conducted the litigation in the name of the bondholders' fiduciaries which may have been an additional reason why it took the firm six and one-half years to conduct the bondholders' foreclosure in the state court,[199] despite which the Committee did not make any objection about the allowance of fees.[200]

Although Mr. O'Brien represented the Granada Bondholders' Committee, he was not particularly interested in the Granada's revenues. On one occasion he had prepared an instrument purporting to justify reducing the *monthly payments* from Arlington to Granada of from $900 to $600. Mr. Edward Hall testified to this in open court[201] and Mr. O'Brien although present did not deny it. The preparation of this instrument occurred while the Granada was in the foreclosure court where Mr. O'Brien and firm supposedly represented the complaining bondholders,[202] although this foreclosure proceeding was only a ruse in the main battle to defeat the Pick furniture claim.[203] Mr. O'Brien and firm also had to do with the Lincoln Park Manor which also purchased heat and other services from the debtor. He was not explicit as to his connection in that regard, however, he merely said, "later * * * *we* got a receiver for the Manor * * *"[205]

195. PR. 503.
196. PR. 499.
197. PR. 497. (This fee was paid with Granada Bondholders money and not with Cody Trust Co. money.)
198. PR. 488 and PR. 220.
199. PR. 502.
200. PR. 214 and PR. 229.
201. PR. 402.
202. PR. 404.
203. PR. 411.
205. PR. 500.

Mr. O'Brien was a difficult witness to cross-examine. He forgot things. Although his firm chartered a new Granada Corporation and transferred most of the assets to it in 1929[206] he had, four years later forgotten all about that and didn't know that the old Granada Corporation had been dissolved[207] and he nearly forgot that he even knew it in 1937 when he testified in the present proceedings.[207] Yes, Mr. O'Brien conveniently forgot many things—things which were important and which he should have freely disclosed to the District Court rather than make the court gather them from its cross-examination of other witnesses with better memories. But when the court heard these other facts, it included them in its findings of fact and they were so undoubtedly true that respondents would not assign error to them.[208] Some of these uncontested findings of fact of the trial court are:

(1) "A prospectus was issued by Chicago Trust Company, and a separate one by Cody Trust Company. Both of these documents are in the record; they repeat the announcement made to the bondholders in 1924, that the security includes the furniture and fixtures at Granada Hotel."[209]

(2) "The Superior Court was not informed about the damage claims and the proceedings on the Wenstrand and appeal bonds * * * it was not known (to any court or Granada creditors) that officials of Cody Trust Company and Wenstrand had agreed to purchase the receiver's certificate if it was not paid off out of Granada funds; nor was it known * * * that Wenstrand and others are indemnitors upon all the Wenstrand bonds in this court."[210]

(3) "The records show that the attorneys whom they (City National) now retain, have been active in all these matters since 1924, and have had to do with most of these litigations. It does not appear that City National or anyone tried at any time to have the Codys

206. PR. 496, 497 and 502.
207. PR. 501.
208. Respondent's assignment of Error, PR. 817-832.
209. Paragraph 16, PR. 774. This related to the refinancing in 1928.
210. Paragraph 25, PR. 777-778.

or the Cody Trust Company or its officials, or the Chicago Trust Company, or its officials, or any successors or receivers for them, or Wenstrand and the other indemnitors on the court bonds that were released by buying the Pick furniture the second time with bondholders' money, and buying new furniture from La Salle Furniture and Supply Company when Pick & Company took away part of the furniture, to have any of these persons perform their promises and duty to the Granada property and the Granada Bondholders.''[211]

(4) ''(One set of attorneys) have prepared the financial papers and (represented) Chicago Trust Company, Thuma, and also * * * Central Republic Trust Company, and City National Bank and Trust Company and the Bondholders' Committee for Granada property.''[212]

(5) ''This method was pursued with relation to Arlington Apartment Hotel property and Lincoln Park Manor Hotel property * * *. For it there is a similar City National Bondholders' Committee. City National was trustee for both Arlington and Lincoln Park Manor.''[213]

(6) ''In present reorganization case, City National and said attorneys filed in writing objection and motion to dismiss on May 17, 1937, in an effort to thwart and stay all action of this court.''[214]

(7) ''City National Exhibit 'X' was prepared by Defrees, Buckingham, Jones and Hoffman, attorneys. They are in this court in this accounting litigation, representing City National, the Granada Bondholders' Committee and a separate accounting suit against Arlington, Inc. * * * They filed the Thuma partial foreclosure on the Granada property in 1930. * * * At that time these attorneys withdrew as counsel for Thuma and immediately appeared on the opposite side of the record as counsel for the Chicago Trust Company, then for the Bondholders' Committee, and then for City National. These attorneys have represented throughout, the Bondholders' Committee for the Granada, the Arlington and the Lincoln Park Manor prop-

211. Paragraph 36, PR. 781-782.
212. Paragraph 44, PR. 785.
213. Paragraph 39, PR. 783.
214. Paragraph 46, PR. 786.

erties, and likewise the City National as Trustee of these properties."[215]

(8) "No person in a confidential relationship to one of these properties could rightfully represent another."[216]

(9) "After 1931 no interest was paid to first or second mortgage bondholders; the tax bill unpaid rose from about $30,000 in 1931 to about $60,000 in May 1937."[217]

(10) "The court does not intend to minimize, but does recognize the many wrongs and injustices to the debtor estate shown by this record, which have been committed by City National, by the Bondholders' Committee and by their attorneys and counsel; the court finds that all equities are with the Court Trustee; but the court believes that justice to all concerned will be rendered more speedily if the opposing claims are set off against each other. * * *"[218]

Thus from these admittedly correct and uncontested findings of fact and conclusions of law of the trial court, the breaches of trust committed by this law firm which claims $24,500 for fees, stands forth in bold, uncontradicted language—language which respondents are now estopped from denying because they assigned no error to it.[219]

Other findings of fact and conclusions of law to which respondents did assign error were amply supported by the evidence and therefore were not argued by the respondents in their briefs in the Circuit Court of Appeals. These findings were:

(1) "In the Wenstrand suit in this court bonds were given of $5,000, $20,000 and finally $40,000 to stay the sale."[220]

(2) "To protect those who initiated the bond issue and sold the bonds, another employee or nominee of Cody Trust named Thuma, was now used to file on June 10, 1930, a suit for partial foreclosure in the

215. Paragraph 48, PR. 787.
216. Paragraph 49, PR. 788.
217. Paragraph 51, PR. 788.
218. Paragraph 57, PR. 790-791.
219. Respondents' Assignment of Error, PR. 817-832.
220. Paragraph 17, PR. 774.

Superior Court of Cook County upon a claim of default upon certain interest coupons of the 1928 second mortgage Granada issue."[221]

These findings indicate the fraud involved in the institution of the foreclosure suit and the use by this law firm of an improper party and straw man as party plaintiff. It was partly for services rendered in this foreclosure action that respondent law firm asks an allowance of fees.[222] Since respondents did not argue against these findings in the Circuit Court of Appeals, they are now estopped to deny their truth.[223] These findings, the truth of which is thus admitted, support other findings which were argued by respondents in the Circuit Court of Appeals. These findings in part were:

(1) "The decree dated December 18, 1936, and orders of 1933 and later in said case 519151 for foreclosure in Superior Court are all void for want of good faith. Granada Hotel Corporation (predecessors of the debtor) was dissolved by the Superior Court of Cook County, Illinois, in cause numbered 50985, upon due complaint by the attorney general of Illinois; and decree entered for dissolution May 17, 1930. All parties knew it was defunct more than two (2) years, when for the first time in August, 1933, proceedings to foreclose first trust deed and to issue receiver's certificate were attempted by cross bill. * * * The Superior Court *Proceedings are void also for non-disclosure and for want of a true trustee party plaintiff.*"[224]

(2) "All these litigations for ten years were conducted and financed with Granada money,[225] and each of them successively was a new step to try to stop execution of the judgment and decree secured in 1928 by Pick under chattel mortgage. This judgment was

221. Paragraph 19, PR. 775.

222. PR. 503.

223. In *Magruder* v. *Drury*, 235 U. S. 106, 113 (1914) this court stated the rule as follows:

"Alleged errors not of a fundamental or jurisdictional character, which were not presented to the appellate court for consideration, and which were waived, either expressly or by implication will not be regarded as before this court."

224. Paragraph 30, PR. 779.

225. Testimony of Vincent O'Brien at PR. 473, PR. 479, PR. 484.

for money which the bankers (who initiated the bond issue and sold the bonds) had owed since 1924. The whole ten years of litigation grew out of the fact that Chicago Trust Company and the Codys and their attorneys[226] failed in their promise to the bondholders in 1924 and 1928 to remove all debt and to tie in the furniture and equipment of the Granada Hotel as part of the security[226] which the bondholders purchased. The property and the bondholders have received the punishment."[227]

(3) "Since the Granada property was built in 1924, one set of attorneys have prepared the financial papers and have represented Chicago Trust Company, Cody Trust Company, Thuma, Wenstrand and Hall as agents and nominees for said companies, and also for Central Republic Trust Company and the Bondholders' Committee for Granada property. Throughout ten years of litigation a connected purpose is shown to prevent a clearance of this property from court entanglements. As each suit come to an adverse termination, a new one was begun in the name of some new Trust Company or some new nominee, whose name was used in some new suit or some new court to delay, embarrass and harass creditors of the estate."[228]

(4) "None of these law suits have accomplished any appreciable good for the debtor estate; none of them has added to or increased the assets which came into the care of this court."[229]

(5) "The record does not disclose that any information ever was given to the bondholders or creditors of Granada, about the receiver's certificate, or any moneys used in furniture litigation; or that the City National as Trustee and the Bondholders' Committee and the attorneys, occupy similar relationships to the Arlington property, and to Lincoln Park Manor property; * * * nor does the record show that any bondholder or creditor of Granada knew that City National and the Bondholders' Committee were employing said attorneys who had formerly represented adverse in-

226. Testimony of Vincent O'Brien at PR. 497, PR. 499.

227. Paragraph 37, PR. 782. See page 92 below.

228. Paragraph 44, PR. 785. See Testimony of Vincent O'Brien at PR. 473-504.

229. Paragraph 45, PR. 785. Likewise the opinion of the Circuit Court of Appeals did not state that the services of these lawyers were beneficial. At PR. 963 the court said: "This we need not determine. * * *"

> terests and currently were representing adverse interest. * * * The breach of confidence thus in evidence is so fundamental as to destroy all right for any of these parties to have compensation or reimbursement for any services."[230]

We now discuss whether the trial court was legally correct in disallowing the fee claims of the committee, the trustee and their lawyers.

Under the Chandler Act a Bankruptcy Court Is a Court of Equity.

Your Honors have often held that a Bankruptcy Court is a court of equity. Five years ago under another Bankruptcy Act this court in *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island and Pacific Railway Company*, 294 U. S. 648, 55 St. Ct. 595 (1935), ruled that bankruptcy courts "are essentially courts of equity."[231]

In the term of court just closed Your Honors again had occasion to speak upon the subject in the opinion rendered in the case of *Pepper* v. *Litton*, 308 U. S. 295, 84 L. Ed. 160, 60 S. Ct. 238, (1939). In this case the court said (p. 304):

> "The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done."

The Congress of the United States in enacting the Chandler Act made it clear that it wished this equity jurisdiction

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230. Paragraph 50, PR. 788.

231. "By section 2 of the Bankruptcy Act (U. S. C. Title 11, S. 11, 11 U. S. C. A. 11), courts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' They are essentially courts of equity and their proceedings inherently proceedings in equity, the words 'at law' probably having been inserted only with regard to * * * authority to arraign, try, and punish bankrupts and others for violations of the act. Their adjudications and orders constitute in all essential particulars decrees in equity."

of the bankruptcy reorganization courts to continue in full force and effect. Section 114 of Chapter X provides that the jurisdiction and powers of the reorganization court after approval of the petition "shall be the same as in a bankruptcy proceeding upon adjudication." Section 2 of Chapter II provides:

> "(a) The Courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested * * * *with such jurisdiction at law and in equity*[232] as will enable them to exercise original jurisdiction in proceedings under this Act * * * to * * * *
>
> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates. * * *"

The broad power granted the reorganization court by Section 212 of Chapter X[233] is also inconsistent with any other view than that the Congress granted the bankruptcy reorganization court very broad equitable jurisdiction and powers. The right to require an accounting is a judicial function limited to only a court of equity. Commenting upon this section as it existed under 77-B, a writer[233-A] has

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232. Italics supplied.

233. Section 212: "The Judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, *may enforce an accounting thereunder*, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor." (Italics supplied.)

233-A. George F. Medill, "Fees and Expenses in a Corporate Reorganization Under Section 77B," 34 Michigan Law Review 331 at 342-343, (1936). This author further states:

> "There is really nothing new about an equity court scrutinizing and disregarding agreements between fiduciaries and those whom they represent. From a very early date it has been the practice of the court to keep a watchful eye on any agreement between a trustee and his *cestui* to see that it is fair and reasonable and represents the true interest of the parties. The court goes to great lengths in protecting the rights of persons not in a position to act for themselves. If one person is before the court as the representative of others, the court of its own volition exercises a vigilant solicitude to protect the interests of those represented against injury or injustice. The creditors and stockholders involved in a complex reorganization seem to be in particular need of someone to look after them."

pointed out that it is "no more than the statement of principles applied in equity whenever there is a fiduciary relationship."

In the case at bar the trial court found it practicable to apply the Chandler Act to the present proceedings and did so apply it.[234] Although this finding of the trial court was assigned as error, respondents did not argue it in the Circuit Court of Appeals. Counsel for respondents, Mr. Vincent O'Brien, knew that whether the old 77B Section or the Chandler Act was applied the result would be the same. As a witness, Mr. O'Brien stated:

> "In the event the court should find the City National Bank has been negligent in one way or another, or has mismanaged in one way or another, and the court surcharges its account, I would take it for the purpose *the Bankruptcy Court is sitting as an equity Court* and that the Judge has the same control over the costs and expenses of the proceedings."[235]

The Circuit Court of Appeals paid lip service to this proposition.[236]

Sitting as a Court of Equity the District Court Properly Disallowed All the Claims of Respondents.

Since the bankruptcy reorganization court is a court of equity, it is under the duty to apply the rules and principles of equity to proceedings pending before it. This is particularly true when the court is forced to determine the validity of claims sought to be allowed to fiduciaries. On such an occasion the court must apply the equity rules relating to fiduciaries.[237]

As we have already seen at pages 21-23 of this brief,

234. Paragraphs 2 and 10, PR. 769 and PR. 771-772.

235. PR. 503-504. Italics supplied.

236. PR. 965.

237. In *Pepper* v. *Litton*, 308 U. S. 295 (1939) this court said (p. 307): "As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowance of their claims in bankruptcy."

the respondents, *i. e.*, the Bondholders Committee, City National as trustee and counsel, were fiduciaries. They petitioned for the allowance of fees. The United States District Court was then under the duty to apply the equity rules governing fiduciary relationships to their fee claims. And the court did just that. As a result of the application of such rules the District Judge disallowed these claims for fees.[238] A reading of the Findings and Conclusions of the trial court discloses the application of these equitable rules in a manner in keeping with the best traditions of American and English equity practice. Throughout these findings the court carefully weighed the evidence in the interests of substantial justice to the end that "substance would not give way to form."[239]

At pages 23-25 of this brief, we have discussed the duties of fiduciaries from a legal standpoint. At pages 25-56 of this brief, we have shown that from a factual standpoint these fiduciaries did not perform those duties and in many ways acted in breach of their trust responsibilities. The trial court found that this was the case. What then was the penalty which a chancellor should impose upon such fiduciary claimants who had violated the equity principles governing the fiduciary relationship? What rule of equity should be applied to these fiduciaries who were disloyal to their trust? The rule applied by the court was: *A fiduciary who is unfaithful to his trust*

238. Findings of Fact and Conclusions of Law, PR. 769-793. Decree, PR. 794-795.

239. Conclusions of Law of the District Court, Paragraph 67, PR. 792: "Legality is not equity, nor a defense. *To use the forms of law to cloak fraud or misuse of funds or property, only increases the wrong done.* Lawsuits as protective cover for fraud are as improper as transfers. Administrative or court approval to an act, without adequate disclosure or fair dealing to absent beneficiaries who have no independent representation, will be treated as void." (Italics supplied.)

forfeits all right to compensation.[240] This is a principle of equity well known to all fiduciaries. Even the most elementary texts on fiduciary duties fully recognize it to the extent of stating that even exculpatory language in the trust instrument will not abrogate the rule.[241] We have already seen that the courts of Illinois follow this rule.[242] The outstanding text on trust law likewise calls attention to this rule.[243] The Restatement of the Law on Trusts[244] adopts the rule but states that the question of compensation is within the court's discretion. The rule has been followed by several Federal Courts. In the case of *In Re Perelstine*, (D. C. Pa., 1930) 44 Fed. (2d) 62, the court said:

> "It is well established law that a trustee or receiver who is unfaithful to the trust forfeits all

240. The trial court concluded that:

> "Continuously since the Committee was organized in 1933, these adverse situations of interests have existed and were fully known to the Committee, to the City National and to said counsel, all of whom have committed breaches of trust in failure to make full disclosure and failure to resign from all but one of said relationships. *The breach of confidence thus in evidence is so fundamental as to destroy all right for any of these parties to have compensation or reimbursement for any services.*" (Italics ours.) Paragraph 50, PR. 788.

241. Loring "A Trustee's Handbook" 1940, Little, Brown and Company. Section 101, pp. 264-265:

> "In a number of cases, the court has deprived the trustee of compensation as a result of a breach of trust but because of the presence of exculpatory language has declined to surcharge him with liability. * * * Needless to say the provision is never effective to save the trustee from liability arising from breach of his duty of loyalty. *Matter of Howard*, 110 App. Div. 61, 97 N. Y. Supp. 23 (1905) aff'd., 185 N. Y. 539, 77 N. E. 1189 (1906); *Matter of Mallow's Estate*, 43 Misc. 569, 89 N. Y. Supp. 554 (1904) aff'd. sub nom., *Matter of Howard*, 110 App. Div. 61, 97 N. Y. Supp. 23, (1905), aff'd., 185 N. Y. 539, 77 N. E. 1189 (1906)."

Also see page 43 of 1928 edition, page 39 of 1907 edition and page 32 of 1898 edition of Loring's "A Trustee's Handbook."

242. Page 25 of this brief.

243. "The Law of Trusts and Trustees" Bogert, (1935) Vol. IV, Sec. 979:

> "In the absence of statute it lies within the discretion of the court having jurisdiction over the accounting to decide whether the conduct of the trustee deserves normal, reduced or no compensation. The court is apt to deny compensation where there has been an important breach of trust, especially if it be of a willful character. * * *"

244. Section 243.

right to compensation. In the instant case, Frederick was unfaithful."[245]

n another case[246] the court under similar circumstances nvolving a breach of trust by an attorney ruled:

"Under elementary principles (if these findings are sustained) petitioner was not entitled to receive or to retain the compensation in question."

The case of *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 282 U. S. 311 (1930), involved a scheme by which an attempt was made to defeat he jurisdiction of the Interstate Commerce Commission ver fees of reorganization managers, committees and awyers. Five Justices of this court ruled that the commission had no jurisdiction over the fees involved since was a matter of private contract with the railroad tockholders. Justice Stone dissented however and his issenting opinion was concurred in by Justices Holmes nd Brandeis. At page 342 the dissenting Opinion stated:

"* * * Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee. See *Davis* v. *Wakelee*, 156 U. S. 680."

espondents in the case at bar were similarly situated. hey entered a court equity and petitioned for the allownce of fees. The trial court sitting as a court of equity enied their petition when it found that they had acted breach of trust for many years. As a court of equity, he trial court had the right to condition its relief upon

245. This portion of the case was affirmed at 46 Fed. (2d) 1019 (1931).
246. *In Re De Ran*, 260 Fed. 732 at 741 (C. C. A. 6, 1919).

the clean hands and conscience of the petitioning fee claimants. When it appeared that the complete transaction was one in violation of true trust responsibilities the court correctly withheld its aid from the respondents and denied their prayer for relief. The trial court could not have made disposition in favor of respondents. After several weeks of hearings conducted in open court the true facts stood out with graphic clarity. But there was no need for the Judge to have heard the proceedings himself, to have reached the same result. Equally from the record, if made on a reference to a Master, the breaches of trust involved would have made their presence known.

For instance: In May 1937 the City National Committee and counsel, presented to the District Court a plan for Granada reorganization.[246a] This plan mentions a claim by City National upon state court decree, as a debt reduced to judgment.[246b] The plan was confirmed July 14, 1937. It was not until August 30, 1937 that City National filed its pleading for approval of its accounts which is part of the present proceeding. In that pleading under oath City National says (PR. 115):

> "* * * that the chancellor in said foreclosure proceedings in and by said decree expressly indicate(d) that by the entry thereof, he did *not* purport to *approve any account of your petitioner* as successor trustee in possession of the said premises * * *."

Neither in the plan nor at any time did City National make disclosure that it had a balance of funds in hand from operation of the Granada Hotel prior to May 17, 1937, when the Court Trustee took over the operation. All these facts were brought out in the present proceeding in October 1937, by cross-examination of City National witnesses and production of City National records. Petitioner submits that the procurement by City National, its committee and

246-A. PR. 66-78.

246-B. PR. 68. "There is due and owing City National Bank and Trust Company of Chicago, as Successor Trustee * * * for its own use and benefit, certain sums established by decree of foreclosure. * * *"

counsel, of the order of confirmation of the Granada plan without such disclosure, was a fraud upon all the beneficial owners of Granada and a fraud upon the District Court.

On May 17, 1937 the Reorganization Court had ordered turnover of all funds and property to the Court Trustee. The Court Trustee at once made his demand orally and in writing. Neither the order nor the demand has yet been obeyed. In the present hearing it was shown by the active ledger sheets of the City National Bank that $1,990.86 remained on deposit from the operation of Granada Hotel.[246c] Not one word about this was mentioned in the Granada plan nor in the subsequent pleadings by City National, the committee or its counsel. Respondents seek payment for preparing this fraudulent reorganization plan.

Even a bird's eye view of the proceedings could have left no doubt of the lack of social conscience and common honesty of those persons and corporations who then stood before that court of equity, asking fee allowances for their (dis)services. Such a bird's eye view of the proceedings would appear thus:

246-C. See page 7 of this brief.

Chart One

Breaches of Trust by the Committee

Masters Served.	Extent of Domination.	Evidence of Relationship Adverse to Granada.	Overt Acts Committed.
1. CITY NATIONAL BANK.	(1) Employer of the two active members[247] and of committee secretary;[248] (2) caused committee to be formed;[249] (3) supplied personnel and office space;[250] (4) if fees were allowed committee they went to City National and not to committee;[251] (5) City National picked lawyers, committee did not exercise own choice.[252]	City National was trustee of Arlington and of Lincoln Park Manor and contracted with itself as trustee of Granada to sell heat and refrigeration to them at reduced price.[253] The Committee did not object.[254] Lawyers for committee were City National's lawyers.[255]	Petitioned for appointment of City National as trustee,[256] and did not object to City National's fees,[257] only had two or three sit in on committee meetings,[258] did not object to useless litigation to harass creditors.[259]
2. CODY TRUST COMPANY AND OFFICERS.	(1) Three members of committee were formerly associated with Cody as employees or co-underwriters. They were: Riddle, Peterson and Kilmer.[260]	Cody Trust Company had issued false prospectus to bondholders which said that furniture was part of the bondholders' security.[261] Cody Trust was the principal *stockholder* of Granada, debtor.[262]	Committee did not seek to hold Cody Trust Company liable for fraudulent misrepresentation or otherwise,[263] and issued Receiver's Certificate to pay for furniture[264] that had almost wholly disappeared from the Granada premises.[265]
3. LEWIS RIDDLE.	A member of the Committee[266] at whose office the committee meetings were at first held.[267] Two former associates were also on the Committee.[267-A]	Riddle was personally obligated as signer on the Pick litigation bond.[268]	The Committee approved the use of Granada funds to pay off Riddle's private liability on the bonds.[269]
4. ARLINGTON HOTEL.	The interlocking Arlington Committee was wholly made up of City National employees[269-A] which employer dominated the Granada Committee,[270] and was trustee of Arlington.[270-A]	Granada sold heat and refrigeration to Arlington.[271]	Payments by Arlington to Granada were reduced from $900 to $600 per month,[272] and a debt of $4,080 due and owing to Granada for the year 1933, was charged off.[273]
5. CHICAGO TRUST COMPANY.	Attorneys for the Committee[274] were attorneys for the Chicago Trust Company.[275]	Chicago Trust Co. had issued a false prospectus to the bondholders which had stated that the furniture belonged to the bondholders.[276]	Committee and attorneys failed to sue the Chicago Trust Company for its fraud on behalf of their bondholders.[277]

247. PR. 239, 336, 423.
248. PR. 421-422.
249. PR. 210-211, 318, 422, 437.
250. PR. 210-211, 469, 318, 336.
251. PR. 210-211, 470.
252. PR. 437, 436.
253. PR. 184, 177, 400, 213, 402, 405-406.
254. PR. 178-179, 400, 213.
255. PR. 437, 436, 473, 489.
256. PR. 212, 239, 436.
257. PR. 214, 229.
258. PR. 229-230.
259. PR. 411, 206.
260. PR. 201-203, 211, 487.
261. PR. 225, 499.
262. PR. 220, 488, 407.
263. PR. 225, 499.
264. PR. 225, 479.
265. PR. 497.
266. PR. 201.
267. PR. 201.
267-A. PR. 201, 203.
268. PR. 229, 476.
269. PR. 229, 479, 225.
269-A. PR. 178-179, 213.
270. PR. 210-211, 239, 470.
270-A. PR. 184, 177.
271. PR. 402.
272. PR. 404.
273. PR. 333, 405-406.
274. PR. 473.
275. PR. 497.
276. PR. 225, 499.
277. PR. 490.

Chart Two

Breaches of Trust by City National as Trustee

Masters Served.	Extent of Domination.	Evidence of Relationship Adverse to Granada.	Overt Acts Committed.
1. ARLINGTON HOTEL.	City National was trustee of Arlington[280] and had set up an Arlington Bondholders' Committee which consisted entirely of City National employees.[280-A]	Arlington purchased heat, refrigeration, hot and cold water from Granada[281] which was controlled by City National as trustee.	Monthly payments from Arlington to Granada were reduced from $900 per month to $600[282] and balance of $4,080 due and owing to Granada was removed from Granada's books by agents of City National.[283]
2. CENTRAL REPUBLIC.	City National was organized to and did take over the employees, banking and trust business of Central Republic. City National transacted all of Central's trust business, including the Granada trust, from 1932 on, long before Central Republic collapsed and resigned from trust.[284]	As successor trustee, City National had the duty of getting a full accounting from Central Republic if it wished to fully protect the Granada bondholders and save itself from liability.[284-A]	Central Republic was released[285] from all liability in regard to Granada without having fully accounted. City National hired the same lawyers as had represented Central Republic.[286]
3. CODY TRUST COMPANY AND OFFICERS.	In creating the Granada Bondholders' Committee[287] City National arranged for three former Cody associates to have committee memberships.[288] If City National as trustee then sued Cody or officers, the Committee could retaliate by suing City National.[289] City National served as depositary under the Committee.	The Cody Trust Company had issued fraudulent prospectuses to the bondholders in both 1924 and 1928.[290] Hiram Cody and two employees named Riddle and Wenstrand were indemnitors on furniture litigation bond of $40,000 in Federal Court.[291]	City National did not sue Cody or its officers for fraud or otherwise.[292] As trustee City National paid the obligation of Cody and others on the indemnity bond with Granada's funds without attempting to collect from them.[293] Cody's lawyers[294] were City National's lawyers, and were counsel for the Committee.[295]
4. CHICAGO TRUST COMPANY AND OFFICERS.	Attorneys for City National were the attorneys for Chicago Trust Company.[296]	Chicago Trust Company had issued a fraudulent prospectus to the bondholders.[297]	City National and attorneys failed to sue Chicago Trust Company on behalf of bondholders for its fraud[298] and condoned the using of bondholders' money a second time to pay for the furniture.

280. PR. 177, 400, 184.
280-A. PR. 213.
281. PR. 213.
282. PR. 402, 304.
283. PR. 333, 405-406, 304.
284. PR. 183, 195-196, 415, 202, 211, 230-231, 421-422.
284-A. PR. 976.
285. PR. 958.
286. PR. 437, 473.
287. PR. 318, 422, 437.
288. Mr. Riddle, PR. 201.
Mr. Peterson, PR. 201.
Mr. Kilmer, 203.
289. Thus by allowing itself to be appointed trustee on the petition of this Committee (PR. 211), City National placed itself in a position where it could not perform its duty against Cody Trust officials.
290. PR. 225, 499.
291. PR. 229-230, 476, 499.
292. PR. 225.
293. PR. 225.
294. PR. 499, 977-978.
295. PR. 473, 487.
296. PR. 497.
297. PR. 499.
298. PR. 499.

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Chart Three.

Breaches of Trust by Defrees, Buckingham, Jones and Hoffman, as Counsel for the Committee.

Masters Served.	Extent of Domination.	Evidence of Relationship Adverse to Granada.	Overt Acts Committed.
1. CITY NATIONAL BANK.	City National hired this firm as its counsel as trustee of Granada[299] when counsel advised the Committee to petition to have City National appointed as such trustee.[300]	City National was trustee of Arlington and Lincoln Park Manor[301] who purchased heat and refrigeration from Granada at a reduced price.[302] It was the duty of counsel for the Committee to see that the Granada Bondholders got the highest possible price for services rendered competing hotels.	The reduced price was kept in effect without increase.[304] and a balance due and owing to Granada before the decrease was arranged was never paid and was cancelled[305] and the committee never sued City National for this mismanagement. *These attorneys claim for services to the committee but were never hired by the Committee.*[306]
2. CENTRAL REPUBLIC TRUST COMPANY.	Defrees, Buckingham, Jones and Hoffman were counsel for this bank as trustee of Granada.[307]	It was the duty of Central Republic to fully account[308] for its stewardship of the trust to the successor trustee, City National. This firm was counsel for both banks.[307]	An arrangement was made whereby Central Republic was released from all liability in connection with its trusteeship of the Granada.[309] This firm was present in court when Central Republic was so released.[310]
3. CHICAGO TRUST COMPANY AND OFFICERS.	Clients of Defrees, Buckingham, Jones & Hoffman.[311]	The bondholders through their committee and trustee had a cause of action against the Chicago Trust Company and its officials because of the fraudulent misrepresentations contained in the prospectus issued by that underwriter[312] and counsel admitted the possibilities of such a cause of action.[313]	No effort was made by any of the respondents to collect in behalf of the bondholders for the damages caused because of the fraud committed by the Chicago Trust Company and its officials.[314] There is nothing in the record showing that counsel ever advised the bondholders or their Committee or trustee of their legal rights against this house of issue.
4. CODY TRUST COMPANY AND OFFICERS.	Clients of Defrees, Buckingham, Jones & Hoffman.[315]	The bondholders through their committee and trustee had a cause of action against the Cody Trust Company and its officers because of the fraudulent prospectus issued by them.[313] The possibilities of such a cause of action was known to the law firm.[313]	No effort was made to collect from the Codys for the fraud committed by them.[316]

299. PR. 473.
300. PR. 436.
301. PR. 400, 184.
302. PR. 405-406.
304. PR. 405-406.
305. PR. 333, 405-406, 304.
306. PR. 437.
307. PR. 473.
308. PR. 976.
309. PR. 958.
310. PR. 482.
311. PR. 497.
312. PR. 499, 325.
313. PR. 499.
314. PR. 499.
315. PR. 499, 978.
316. PR. 225.

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Chart Three—Continued.

Masters Served.	Extent of Domination.	Evidence of Relationship Adverse to Granada.	Overt Acts Committed.
5. MR. WENSTRAND.	Wenstrand was a client of Defrees, Buckingham, Jones & Hoffman.[317]	Wenstrand was personally obligated to pay on a $40,000 indemnity bond signed by him in the furniture litigation in which case this law firm was his counsel.[318]	Bondholders' money was taken from the Granada trust fund in the possession of the trustee, and Wenstrand was released from his $40,000 liability.[319]
6. ARLINGTON HOTEL.	The Arlington Hotel was a client of this law firm by reason of the fact that the firm was counsel for City National as Trustee of Arlington[321] and also was counsel for the Arlington Bondholders' Committee.[322]	Arlington purchased heat and refrigeration from Granada.[323]	This firm drew up a memorandum purporting to be a contract[324] which reduced the monthly payments to Granada from $900 to $600.[325] Later a balance of $4,080 on Granada's accounts receivable books, due from Arlington prior to the reduction was cancelled by a journal entry of a Mr. Hall[326] who was also a client of this firm.[327]
7. MR. THUMA.	Thuma was a client of Defrees, Buckingham, Jones & Hoffman.[328]	Thuma "owned" some *second* mortgage bonds on Granada.[329]	Although this firm during and since April of 1933 was counsel for the *first mortgage* bondholders of Granada (the committee)[330] and claim fees as such, they conducted until Aug., 1933 a foreclosure of the *second mortgage bonds* in the name of Mr. Thuma.[331] Then they withdrew as counsel for Thuma and immediately appeared on the opposite side of the record as counsel for Chicago Trust Company, then for the Bondholders' Committee, and then for City National.[332]
8. LINCOLN PARK MANOR BONDHOLDERS' COMMITTEE.	Defrees, Buckingham, Jones & Hoffman were counsel for this other committee, and for City National as trustee of the Lincoln Park Manor property.[333]	The Lincoln Park Manor Hotel purchased heat, refrigeration and other services from the Granada Hotel.[333]	None.[334]

317. PR. 496, 499, 503.
318. PR. 229, 499, 475-476.
319. PR. 229.
321. Uncontested Finding, Par. 48, PR. 787.
322. Uncontested Finding, Par. 48, PR. 787.
323. PR. 213, 402.
324. PR. 402.
325. PR. 405-406.
326. PR. 333.
327. Par. 44, PR. 785.
328. Uncontested Findings, Paragraph 44, PR. 785.
329. Uncontested Findings, Paragraph 48, PR. 787.
330. PR. 473.
331. Uncontested Findings, Paragraph 48, PR. 787.
332. Uncontested Findings, Paragraph 48, PR. 787, and also PR. 400.
333. PR. 213.
334. Paragraph 43, PR. 784-785.

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In Response to the Third Question Presented and to Assignments of Error (a), (b), (c), (o) and (p).

II.

A CIRCUIT COURT OF APPEALS IS BOUND TO PROCEED IN ACCORD WITH THE PRINCIPLES OF DUE PROCESS OF LAW AND MAY NOT REVERSE THOSE FINDINGS OF THE TRIAL COURT WHICH WERE NOT CONTESTED NOR ASSIGNED AS ERROR.

When the Circuit Court of Appeals reversed findings of fact of the District Court, which findings had not been contested by respondents in their assignment of errors or otherwise, it violated due process of law because that action denied this petitioner notice, hearing and his day in court.

This petitioner urges that the United States Circuit Court of Appeals for the Seventh Circuit has denied him that due process of law, which is guaranteed to him and the Granada owners by the Fifth Amendment to the Constitution[335] of the United States. The legal basis of this contention is that right to that "due process of law" to which the amendment refers is not confined to the proceedings and judgment of a trial court but fully exists in reference to the proceedings and judgment of a Court of Appeal. *An Appeal Court is not insulated from the Constitution.* Due process may be denied by an appeal court's departure from established procedure or lack of notice and hearing, just as violently and completely as it can be denied by a court of first instance. This is particularly true when the appeal court reverses the trial court, but it is even true of an affirmance.

In *Lutcher & Moore Lumber Company* v. *Knight*,[336] decided by this court thirty years ago, it was held that when a Circuit Court of Appeals affirmed a judgment of the court below on a fact not in issue in the court below and without having given an opportunity to the parties

335. "No person shall be * * * deprived of * * * property without due process of law * * *."

336. 217 U. S. 257, 30 S. Ct. 505 (1910).

to be heard upon that issue, it denied the appellants their "day in court" or

> "was the equivalent to condemning them without affording them an opportunity to be heard."

Some seven years later in *Saunders* v. *Shaw*,[337] this court ruled that another appeal court deprived a litigant of due process of law, when it reversed the judgment on the basis of a proposition of fact not in issue in either court and without affording the litigant the opportunity to be heard on that fact.

In the case at bar certain facts were generally admitted by respondents. Many of these facts thus admitted were made the basis of the findings of the trial court.[338] The present respondents were the appellants in the Circuit Court of Appeals and as such prepared and filed a certain assignment of errors.[339] This assignment of errors did not attack certain of these findings and therefore these findings stood admitted before all the world.[340] The Circuit Court of Appeals however reversed *all* findings of fact of the trial court including those which were not in issue in either court since no error had been assigned to them.[340a] The Circuit Court of Appeals went so far as to quote one of these partially admitted findings in order to prove to itself that the trial court committed error. Thus at PR. 966-967 the Court of Appeals quotes from Finding 57,[341] most of which (see Appendix D) was admitted by respondents' failure to assign error to the greater portion of it. Among the things admitted in that finding were:

> (1) The record shows many wrongs and injustices to the debtor estate committed by City National, the Bondholders' Committee and their attorneys;

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337. 244 U. S. 317 (1917).

338. PR. 769-794.

339. PR. 817-832.

340. *Magruder* v. *Drury*, 235 U. S. 106, 113 (1914).

340A. Decrees at PR. 970-971.

341. PR. 790-791.

(2) That all the equities are with the Court Trustee;

(3) That the opposing claims should be set off against each other.

Petitioner submits that the Circuit Court of Appeals departed from due process of law when it thus attacked and reversed findings of fact which stood admitted and not in issue and then proceeded without notice to write new findings of fact on questions not raised in that court. It amounted to an arbitrary and capricious refusal by that court of appeals to be bound by the record and the pleadings. The result of this technique was to

(1) Create new issues of fact and law of which petitioner had

(2) no notice and therefore could not have

(3) his "day in court" or

(4) a reasonable opportunity to prepare as counsel.

As such the action of the Court of Appeals amounted to a substantial denial of full hearing and notice, which are the essential requisites of due process of law.[342]

The Circuit Court of Appeals thus by acts of omission and commission disposed of the case in a manner which was at variance with the record and the admittedly correct findings of the trial court. Petitioner submits that this was a *capricious and arbitrary disposition of the case* and as such was in violation of due process of law as was held in the cases below cited.[342]

The uncontested findings of the trial court adequately support the judgment of that court. The most important of these admitted findings were in paragraph 11 (PR. 772); 14 (PR. 773); 16 (PR. 774); 22 (PR. 776); 25 (PR. 777-

342. *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U. S. 464 at 476, (1918), where this court ruled that the Supreme Court of Kentucky denied due process of law under the Fourteenth Amendment.
Also:
Morgan v. *U. S.*, 304 U. S. 1 (1938).
Morgan v. *U. S.*, 298 U. S. 468 (1936).

778); 26 (PR. 778); 33 and 34 (PR. 780-781); 35 and 36 (PR. 781-782); 38 and 39 (PR. 782-783); 40 (PR. 783); 44 (PR. 785); 46 (PR. 786); 48 (PR. 787); 49 (PR. 787-788) and 57 (PR. 790-791).

The portions of the above paragraphs that were thus admitted are reprinted at Appendix D of this brief.

The Circuit Court of Appeals not only failed to give any meaning or effect to the findings of fact thus admitted, but reversed them.

In Response to the Fourth Question Presented and to Assignments of Error (d) and (p).

III.

A COURT OF APPEAL CANNOT OVERRULE THE FINDINGS OF FACT OF THE TRIAL COURT WITHOUT FIRST HAVING ANALYZED THE EVIDENCE UPON WHICH THOSE FINDINGS WERE BASED.

The Circuit Court of Appeals committed error when in violation of Rule 52 of the Rules of Civil Procedure it reversed the findings of fact made by the trial court.

Rule 52[343] of the Rules of Civil Procedure in part states:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Thus it appears that the Court of Appeal must, before reversing the trial court's findings of fact, determine that those findings are "clearly erroneous". This requires an analysis of the most intensive and extensive kind. It requires a deep application by the Judges of the appeal court. If after such an analysis it appears that the evidence (which was the basis of the finding of fact) was conflicting, then the Court of Appeals has no alternative, *but must*

343. 28 U. S. C. A. following Section 723c.

affirm the trial court's findings since they are not, under such circumstances, clearly erroneous.[344]

But the Circuit Court of Appeals reversed the trial court in the case at bar without such an analysis. On the question of the findings regarding the right of the respondents at bar to fees the Court of Appeals said not a thing. That court only partially examined the other half of the consolidated case;—that half having to do with the question of whether the respondents should be held liable for waste and have affirmative damages assessed against them. When the Court of Appeals came to the question of fees they merely said:[345]

> "We have concluded those findings were without substantial support * * *."

Whereupon, without analysis or discussion the Court of Appeals reversed *all* findings of the trial court.

Now respondents may claim that such an analysis was made even though the court did not perform its recordation duty[346] of dealing satisfactorily with the evidence in its opinion. But the reasoning of the opinion displays a total lack of analysis of the disclosures made in the trial court. Clear mistakes of fact (which appear throughout the opinion) were called to the attention of the Court of Appeals

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344. *Dooley* v. *Pease*, 180 U. S. 126, (1900). At pages 131-132 this court said:

> "Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals or by this court, if there was any evidence upon which such findings could be made."

To the same effect are:

H. H. Cross Co. v. *Simmons*, 96 F. (2d) 482, 486.
In Re Peacock Food Markets, 108 F. (2d) 453, 457.
U. S. v. *Tyrakowski*, 50 F. (2d) 766, 771.
Scavenger Service Corp. v. *Courtney*, 85 F. (2d) 825, 831.

345. PR. 453.

346. In an address before the American Bar Association, in which he dealt with the duties of courts, Professor Roscoe Pound in part said:

> "* * * it is generally felt to be important that the reasons of every judicial decision in our highest courts be set forth fully in written opinions, accessible to the profession and to the public, and that the courts should pronounce definitely upon every point raised by counsel. Here is a subject on which courts and judicial councils should be at work in the near future, if our common-law technique is not to break down." (Quoted as reprinted in XXV American Bar Association Journal, September, 1939, page 731 at 733.)

by the "Petition for Rehearing."[347] It would serve no satisfactory purpose to restate all of these mistakes here. A reference to such however may be helpful, showing as it does, the important scope of the omissions of the court of appeals. For this reason we respectfully refer the court to the "Four Salient Omissions" as contained in the petition for certiorari at pages 15 to 35 and to Appendix E of this brief entitled: "The Facts of the Case as Illustrated by Respondents' Admissions of Record in the Pleadings." Point I of the Argument as contained in this brief deals with the admissions made by respondents' witnesses in their testimony before the trial court.

Petitioner submits that the action of the Circuit Court of Appeals was so capricious and arbitrary as to be unpredictable to the point of denying this petitioner his day in court. Without contradicting or mentioning most of the material contained in the trial court's findings of fact, it overruled and reversed all findings of the District Court including those which were not denied or contested by respondents.

In Response to the Fifth Question Presented and to Assignments of Error (l), (m), (n) and (p).

IV.

A CIRCUIT COURT OF APPEALS HAS NO JURISDICTION OF AN APPEAL TAKEN IN VIOLATION OF SECTION 250 OF THE CHANDLER ACT AND PRESENTED WITHOUT A RECORD HAVING BEEN FILED AS PRESCRIBED BY RULE 73(G) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Circuit Court of Appeals erred in not dismissing these appeals as requested by petitioner's motions, since appeals taken by the wrong manner do not confer jurisdiction.

When respondents decided to appeal from the decision of the District Court they took two appeals, one by right

347. PR. 973-990.

and one by leave. Petitioner contends that both of these appeals were invalid and should be dismissed by the Circuit Court of Appeals for want of jurisdiction. Each of these appeals was given a separate number by the Clerk of the Circuit Court of Appeals. One was numbered 7060 and the other was numbered 6986. This petitioner made several motions in the Circuit Court of Appeals to have each of these appeals dismissed.[448] Each of these motions was denied by the court. Let us now discuss each of these appeals separately.

Appeal 7060 should have been dismissed by the Circuit Court of Appeals for failure to comply with Section 250 of the Chandler Act.

This appeal was taken by filing a notice of appeal in the District Court on June 1, 1939.[449] As such it amounted to an appeal by right. As is shown by the record it was an appeal from the Findings and Decree of the District Judge which denied respondents compensation and reimbursement for "services". Section 250 of the Chandler Act provides that such appeals are to "be taken to and allowed by the Circuit Court of Appeals * * *."[450] In the case of *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, decided by Your Honors last March, it was determined that Section 250 applied to such a case as the one at bar and that such an appeal could be taken only by leave of the Circuit Court of Appeals and could not be successfully taken by the filing of a notice of appeal in the District

448. Motions of September 16, 1939,—PR. 887-895.
Motion of September 26, 1939,—PR. 913-915.
Motions of November 8, 1939,—PR. 925-941.
Motion of June 22, 1940,—PR. 1013-1024.

449. PR. 796-798.

450. The complete quotation of Section 250 is:
"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Court. As such the rule as set forth in *Shulman* v. *Wilson-Sheridan Hotel Company,* 301 U. S. 172, was affirmed insofar as it prohibited fee or compensation appeals as of right. This petitioner understands that Your Honors will again decide the question at this term of court in the case of *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group,* and that to that end certiorari was granted on June 3, 1940, at 310 U. S. 622-623.[451] Unless Your Honors determine to reverse the rule of the *Dickinson case,* it would seem that the United States Circuit Court of Appeals was plainly in error in refusing by its several orders[452] to dismiss fee appeal 7060 which had been taken as of right upon a notice of appeal filed in the District Court.

Appeal 6986 should have been dismissed by the Circuit Court of Appeals for failure to file the record as required by Rule 73(g) and otherwise.

This appeal was taken by leave of the Circuit Court of Appeals.[453] To all intents and purposes the respondents filed no record for appeal 6986.[454] Instead they chose to consolidate the record of appeal 7060 into and with appeal 6986.[455] This the Court of Appeals permitted them to do.[456] But for several reasons the record in appeal 7060 had not been filed in accordance with the law.

Reason One: The appeal record was not filed with the Circuit Court of Appeals within 40 days as provided by Rule 73(g) of the Rules of Civil Proce-

451. Reported below at 111 Fed. (2d) 37.

452. Order of October 4, 1939 at PR. 920-921.
Order of November 27, 1939 at PR. 953.
Order of July 3, 1940 at PR. 1033.

453. PR. 842-849.

454. PR. 1017. "In 6986 appellants filed only a short record consisting of decree and four items on July 1939. That was filed without leave of court, without notice to anyone, and was prepared on a special short praecipe that was never served on anyone." Court Trustee's motion of June 22, 1940.

455. PR. 876.

456. Paragraph (b) of order of October 4, 1939 at PR. 921.

dure.[457] The notice of appeal was filed in the District Court on June 1, 1939,[458] but the record was not filed until August 19, 1939.[459]

Reason Two: The 40 days expired on July 11, 1939, and respondents did not ask the Circuit Court of Appeals to extend the time for filing record of 6986 until July 19, 1939,[459-A] at which time they were already in default. Therefore on the authority of Rule 73(g)[460] and of *West* v. *Irwin* (C. C. A. 7), 54 Fed. 419, the order extending the time was void.

Reason Three: The order for the extension of time was sought and received from the Circuit Court of Appeals instead of from the District Court which by Rule 73(g) had exclusive jurisdiction over the matter of extending the time within which to file the record on appeal.[460]

Reason Four: The order of consolidation whereby the respondents sought to save their appeal by consolidating the records of the case was not asked for until September 8, 1939.[461] At this time the Circuit Court of Appeals had no jurisdiction of the case since in appeal 6986 the respondents had failed to file their record as above noted and jurisdiction was lost on July 11, 1939 and appeal 7060 had not been docketed until August 19, 1939, instead of on or before July 11, 1939 (40 days after the first notice of appeal), and also because appeal 7060 was taken as of right instead of by leave.

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457. Rule 10 of the Circuit Court of Appeals, Seventh, states:
"The record on appeal shall be prepared and the transcript filed in this court, as provided in Rules 75 and 76 of the Federal Rules of Civil Procedure."
The Rules of Civil Procedure state:
"Rule 73(g). *Docketing and Record on Appeal.* The record on appeal as provided for in *Rules 75 and 76* shall be filed with the Appellate Court and the action there docketed within 40 days from the date of the notice of appeal; * * *" etc.

458. PR. 796.

459. PR. 1027.

459-A. PR. 870-872.

460. Rule 73(g) provides for an extension of time as follows:
"* * * except that when more than one appeal is taken from the same judgment to the same appellate court, the *District Court* may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases *the District Court* in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, *if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed* or as extended by a previous order. * * *" (Italics supplied.)

461. PR. 875.

Additional reasons why these appeals should have been dismissed were listed and discussed in the Court Trustee's motion of June 22, 1940.[462] The respondents answered that motion.[463] The answer did not tend to clarify the facts involved. Statements about motions made did not specify as to which appeal such motions related. Thus at PR. 1027 a discussion is conducted as to a motion made in the District Court. This discussion would seem to indicate that the motion had been made in reference to appeal 6986 when in fact it had been made in reference to 7060 which appeal was invalid under Section 250 of the Chandler Act and the rule of the *Dickinson Case.*

Since appeal 7060 was invalid the record filed in that appeal could have no independent validity. Even had respondents filed it within the proper time and even had they consolidated the appeals within the proper time, they could only have had a situation where a good appeal without a record (6986) had been consolidated with the record of a bad appeal (7060), and therefore if appeal 7060 had been dismissed upon this petitioner's motion, as it should have been, then such an order of dismissal would have carried with it a dismissal of that case's record. Appeal 6986 would then have been left standing alone without any record whereupon the court of appeals would be forced to either dismiss such appeal or affirm the District Court.

Petitioner submits that the Circuit Court of Appeals was without jurisdiction to hear these two appeals and that as such the opinion rendered by that court is null and void.

Petitioner also submits that the Circuit Court of Appeals committed error when it failed to retax costs in conformance with the motion of the Court Trustee.[463-A]

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462. PR. 1007-1024.
463. PR. 1025-1033.
463-A. PR. 1021-1023.

In Support of Assignment of Error Q.

V.

A BANKRUPTCY REORGANIZATION COURT HAS JURISDICTION AND POWER TO DISALLOW FEE AWARDS WHICH HAVE BEEN MADE BY STATE FORECLOSURE COURTS.

The Circuit Court of Appeals erred in ruling that the Federal District Court had no power to readjust or review and disallow the fee awards of State foreclosure court.

Throughout its opinion the Circuit Court of Appeals constantly referred to state court decrees as a justification for certain sharp practices and as an explanation of why the District Court had no jurisdiction to contest the good faith or clean hands of the petitioning fiduciary fee claimants. Thus the appeal court said,[464]

> "The amounts of $13,000 and $7,500 charged to City National in this item were paid in conformity with the decree of the Superior Court."

and

> "In order to sustain the charges in Item IV, it is necessary, of course, to hold that the proceeding in the State Court * * * was void."[465]

and

> "The state court found the amounts retained to be reasonable and approved the same by decree."[465]

Up to this point the opinion was merely dealing with the counterclaim of the trustee. Then the Court of Appeals spoke about the fees of the respondents. It spoke in terms that could no longer be misunderstood. It placed its opinion's foundation upon the state foreclosure court's fee award. After stating that the claims of City National and of the committee should be paid in full, the Court of Appeals said:[466]

> "At the commencement of the hearing, counsel for City National stated:
>
> '* * * we are willing that the court here fix the

464. PR. 961.

465. PR. 962 and also see PR. 965-966.

466. PR. 967-968.

reasonableness of the charge for services rendered by us in the state court proceedings on behalf of the Indenture Trustee, notwithstanding the existing limitations upon the Federal Court's right to review the allowance for such services made by the state court in the decree of sale.' In view of this concession, the court has the right to review *the reasonableness* of the allowances made in the state court upon which claim No. 9 is predicated. In doing so, the state court proceeding should be considered as valid and untainted by fraud."[467]

Thus the Circuit Court of Appeals held:

(1) That generally a bankruptcy court cannot readjust the fee awards of state courts;

(2) That a bankruptcy court may readjust such fee awards only if the claimant allows the bankruptcy court to do so;

(3) That the District Court never has the power as a bankruptcy court to *deny* the fee claims of parties whose claims have been allowed by a state court, but may only determine whether such an award was *reasonable*,—assuming perforce that the right to some fee existed.

How the Circuit Court of Appeals ever got the idea that the state court had allowed fees is impossible to state. Throughout the record the contrary appears and it is admitted that the state court refused to approve City Nationals accounts and said so.[468] Thus the City National Bank and Trust Company brought its accounts into the United States District Court. This "report and account" admitted the status of the state court proceedings by stating:[469]

"* * * your petitioner * * * represents to the court that the chancellor in said foreclosure proceedings in and by said decree expressly indicate(d) that by the entry thereof, he did not purport to approve any account of your petitioner as successor trustee in possession of the said premises * * *"

467. Italics supplied.

468. At PR. 128 it appears that the state court judge had written at the end of the decree the following words:

"The court by the entry of this decree does not approve the accounts of the trustee in possession of the premises involved herein."

469. PR. 115.

We see therefore that the state court had disallowed the accounts of City National, and that City National, still wishing that some court would approve them, brought them into the Federal bankruptcy court and that that court also disallowed the accounts;[470] that an appeal was taken whereupon the Circuit Court of Appeals suddenly decided that these accounts had been approved by the state court and that the District Court had no jurisdiction to disallow the accounts. Petitioner submits that respondents were probably as surprised at this as was he,[471] although they later denied it when they claimed that the opinion had not "overlooked or misapprehended" any points.[472]

Petitioner submits that even if the state court had approved the accounts of City National and the fee payments therein credited that the Federal District Court sitting as a court of equity could have disallowed such accounts and could have denied its aid to the claimants in securing the payment of such fees. Petitioner is supported in this belief by the opinion rendered by the Sixth Circuit Court of Appeals in the case of *Butzel* v. *Webster Apartments Co.*, 112 F. (2d) 362 (1940). At page 366 the court spoke of the power and jurisdiction of a court of bankruptcy to reduce the amounts to be allowed claimants who had secured their claims by state court judgments. The court then said:

> "A *fortiori*, this power is equally effective to reduce the claims for legal services rendered to the mortgage trustees and in adjusting these amounts according to principles of equity and good conscience, the court was not violating or impairing contractual obligations."

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470. PR. 789.

471. At PR. 503-504 counsel for City National *et al.*, had stated in his Federal Court testimony that,

> "In the event the court should find the City National Bank has been negligent in one way or another, or has mismanaged in one way or another *and the court surcharges its account*, I would take it for that purpose the Bankruptcy Court is sitting as *an equity court* and that the Judge has the same control over the costs and expenses of the proceeding."

472. PR. 998.

The applicable section of the Chandler Act places a duty upon the bankruptcy court to determine for itself upon equitable principles whether such fees should be paid. This section is No. 258.[473] It states that,

> "The judge shall *make such provision as may be equitable* for the protection of the obligations incured by a receiver or trustee in such prior proceeding and for the payment of the reasonable costs and expenses incurred therein *as may be allowed by the judge.*"[474]

Petitioner submits that the opinion of the Circuit Court of Appeals fails to give the necessary meaning and application to the last seven words of this Act of Congress and further fails to give the word "equitable" its necessary meaning and application to the facts of the present case. Under Point I of this Argument, petitioner has shown that according to the rules of equity relating to fiduciaries, no compensation should be allowed to the respondents since they violated and breached their trusts. Section 258 of the Chandler Act places the question of fiduciary compensation for services rendered in prior proceedings upon the same identical basis as compensation for services rendered in the bankruptcy proceeding. That basis is a compliance by such fiduciaries with the rules and principles of equity and fair dealing.

In the case of *Pepper* v. *Litton*, 308 U. S. 295 (1939), Your Honors dealt with the question of the disallowance by a bankruptcy court of a fiduciary's claim which had been reduced to judgment in a state court. Although this was not a fee claim which arose in foreclosure proceedings, it seems to this petitioner that the general principles of equity as expressed by this court in that opinion are wholly applicable to the question here under discussion. This is particularly true since that opinion deals with the jurisdiction

473. This section is derived from part of former section 77B (i) (11 U. S. C. A. Sec. 207(i)).

474. Italics supplied.

and power of the bankruptcy court to disallow judgment claims based upon salary obligations of the bankrupt to its fiduciaries. As in the case at bar:

> "Nor was there presented to the state court the question of whether or not the * * * judgment might be subordinated to the claims of other creditors upon equitable principles."[475]

Your Honors then called attention to the fact that the judgment creditor had voluntarily submitted his judgment claim to the bankruptcy court for allowance and that such action plainly gave the bankruptcy court jurisdiction and power to subordinate or disallow it.[476] The opinion then states that a court of bankruptcy is a court of equity,[477] and as such may inquire into the essential liability behind the judgment for purposes of proof and allowance.[478] Speaking of the right of a bankruptcy court to disallow such fiduciary judgment claims Your Honors said:[479]

> "And that result may be reached even though the salary claim has been reduced to judgment. It is reached where the claim asserted is void or voidable because the vote of the interested director or stockholder helped bring it into being or where the history of the corporation shows dominancy and exploitation on the part of the claimant.[480] It is also reached where on the facts the bankrupt has been used merely as a corporate pocket of the dominant stockholder, who, with disregard of the substance or form of cor-

475. 308 U. S. at pages 302-303.

476. 308 U. S. at page 303.

477. 308 U. S. at pages 304-305.

478. 308 U. S. at pages 305-306.

479. 308 U. S. at pages 309-310.

480. PR. 780-781, Par. 33. The trial court found that:
"From October, 1932, the City National assumed and exercised real control over Granada affairs. * * * An order was secured * * * on motion of Granada Bondholders' Committee to appoint City National * * * successor trustee under the trust deed."
PR. 783, Par. 40. The trial court found that:
"The committee has been at all times dominated and controlled by City National."

porate management, has treated its affairs as his own."[481]

Your Honors then indicated that the consideration for the disallowance of such a claim

> "* * * may be simply the violation of rules of fair play and good conscience by the claimant;[482] a breach of the fiduciary standards of conduct which he owes the corporation, its stockholders and creditors.[483] He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty.[484] He cannot by the intervention of a corporate etity violate the ancient precept against serving two masters."[485]

Your Honors then stated that:[486]

> "Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

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481. At Par. 46, PR. 786, the trial court found:
"City National (self-appointed by its own committee) claimed to be trustee under the 1928 first mortgage trust deed, but it dealt with Debtor property as though it were the general owner of all Granada affairs. The fullest control was taken over all manner of personal property including notes and other securities representing general moneys due the Debtor Estate. In practice City National made itself general trustee far beyond any supposed authority under the order of Superior Court."

482. Uncontested finding of trial court, paragraph 57, PR. 790-791:
"The court does not intend to minimize, but does recognize the many wrongs and injustices to the debtor estate shown by this record, which have been committed by City National, by the Bondholders' Committee and by their attorneys and counsel; the court finds that all equities are with the Court Trustee. * * *"

483. At Par. 44, PR. 785, the trial court found that:
"As each suit came to adverse determination, a new one was begun in the name of some new Trust Company or some new nominee, whose name was used in some new suit or some new court *to delay, embarrass and harass creditors* of the estate." (Italics supplied.)

484. At Par. 42, PR. 784, the trial court found:
"Instead of reorganizing three properties as a unit or resigning from two of the trusts, City National officials at the beginning of 1934 consummated a course of action which had been planned for a year, by charging off a balance of Four Thousand Eighty Dollars ($4,080) that had been regularly billed to Arlington and placed upon the Granada books of account for heat, hot and cold water and refrigeration services furnished by Granada during the year 1933."

485. For a list of the masters served see pp. 64-70 of this brief.

486. 308 U. S. 311.

We have seen that in the case at bar the District Court found that there had been a violation of those principles of equity relating to fiduciary duties. The record is replete with citation and recitation of these breaches of trust conduct. As a result of such proof and findings the trial court disallowed the fee claim of the respondents for alleged services rendered in prior state court foreclosure proceedings. Petitioner submits that even if such fee claim was hidden behind a state court judgment that the trial court, as a court of bankruptcy and of equity, had full power and authority to readjust or disallow the claim and that the Circuit Court of Appeals was in manifest error in holding otherwise.

In Conclusion.

This petitioner submits that the District Court did not abuse its judicial discretion in denying fees to the respondents. As a bankruptcy reorganization court it sat as a court of equity. The admissions made by the pleadings, and by the testimony of respondents and their witnesses, showed such a lack of trust loyalty, that the District Court, acting within the scope of its discretion, correctly saw fit to disallow fees to the respondents.

That part of the opinion of the Circuit Court of Appeals which deals with the Court Trustee's counterclaim,[487] ignores the realities of the situation, when it states that City National was not trustee of Granada until January 3, 1935,[488] despite the fact that two high ranking officers of City National[489] had admitted that City National from October 5, 1932, the date it was organized,[490] had "serv-

487. PR. 955-966.

488. PR. 960.

489. Mr. Leonard, Vice-President in charge of City National Trust Department (PR. 230) and Mr. Bickel, assistant Trust Officer (PR. 183).

490. PR. 183.

iced" the Granada trust even though Central Republic was nominally trustee of record.[491] Thus City National *acted* as trustee and as such operated the Granada trust, and all Granada property. When these witnesses state that City National "serviced" the Granada trust, they established that City National acted as trustee long before it took over the property "formally on the record, in January 1935."[492] City National regarded Central Republic as one of its own departments. Central Republic was a department that sent trust business to City National, but sought not to send liability for trust mismanagement along with the business. The extent of City National's attitude, that Central Republic and City National were one and the same thing, is shown by the fact that City National presumed to act as depositary in the Granada Matter, under the deposit agreement signed only by Central Republic.[493] City National did not assume this depositary business by virtue of any new agreement or by any order of court, but acted as depositary after receiver was appointed for Central Republic,[494] and until the matter came into the Federal District Court. City National's lawyers treat City National and Central Republic as being one and the same thing when they testify that *City National* was appointed depositary by virtue of this deposit agreement[495] which agreement only purported to appoint *Central Republic* as depositary. A part of the fees requested by City National were for their services as "depositary." Petitioner has searched the record diligently and cannot find any agreement or court order which purports to appoint City

491. Testimony of Mr. Leonard, PR. 230-230.
Testimony of Mr. Bickel, PR. 195-196 and 415.

492. PR. 196.

493. PR. 9-50.

494. November 20, 1934, PR. 958.

495. City National's counsel testified:
"We were requested to and did prepare a deposit agreement, which was dated April 25, 1933, under which City National Bank and Trust Company was named as depositary * * *."

National as depositary. Petitioner asks respondent to show this court by what authority it acted as such depositary, and by what authority it claims fees.

The breaches of trust shown throughout this printed record (which was abstracted and prepared by the respondents) are sufficient reasons why fees and expenses should have been denied to all of the respondents. The Chandler Act and its predecessor, Section 77B, were designed by Congress to reduce the amount of fees paid in bankruptcy proceedings to professional reorganizers. In the petitioner's reply to the answer filed by respondents to his petition for certiorari he showed that the Chandler Act's purpose has been thwarted by the Seventh Circuit Court of Appeals, and that as the record then stood (September, 1940) this Circuit Court of Appeals had increased fees in seventeen corporate reorganization cases, and had decreased fees in only two cases. The case at bar was one of the seventeen cases wherein the Circuit Court of Appeals reversed the District Court and ordered higher fees paid to committees, trustees and lawyers.[495a] That this new policy and attitude of the Circuit Court of Appeals is at war with the historic policy and attitude of that court is clearly shown by the opinion rendered *in 1900* by this Circuit Court of Appeals for the Seventh Circuit in the case of *In Re Curtis*, 100 Fed. 784, when the court said at page 795:

> "We think, however, that the dignity and honor of the profession are not conserved, or its influence for good promoted, by excessive allowance for service. That would lend countenance to the suggestions sometimes heard that the commercial spirit of the age has invaded even the legal profession, to the impairment of its dignity, the blunting of its sense of honor; and that a profession instituted for the maintenance of justice has become degenerate, and that its main calling now is a vulgar scramble for the 'Almighty dollar'."

This petitioner submits that so far as the case at bar is concerned the charge that "the commercial spirit of the

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[495-A.] For a comprehensive list of these cases see the chart at the end of the reply filed by petitioner on September 28, 1940 in this court.

age has invaded even the legal profession" amounts to a gross understatement. For ten years Granada bondholders have, through no choice of their own, and without a disclosure of the true facts being made, been forced to pay for useless litigation which was engaged in only to protect bankers and others from the liability of their own dishonesty. Indeed,—"the commercial spirit of the age" has not only invaded a portion of the legal profession but in some instances members of the legal profession have captured and glorified this commercial spirit, to the abolishment of ethics and fiduciary duty.

The breach of trust charts at pages 64-69 of this brief fully disclose the extent of the infiltration of market place morals into the ways of thought and conduct of fiduciaries. Shrewdness, sharpness and shadiness have displaced loyalty as the guiding, ever present sign of the trust relationship. Not only is social conscience a lost attribute but conscience of any description has almost become a thing of the past. The corporate fiduciary at bar has displayed no conscience and it should have no fees. Its self-created committee is without any independent moral perception. It should not be paid. The lawyers served many masters. They did not serve the bondholders. The bondholders should not pay them for services not received nor for the detriment caused to the bondholders by them. As one court has said:[496]

> "There is a manifest injustice and inequity in taking out of a fund or property in the custody of a court compensation for the services of an attorney or for the service of any other party by means of which the fund or property has been taken or kept from its true owner. The latter ought not to be required to pay for services which have been a positive detriment to him."

More than this, breaches of trust by fiduciaries can be stopped only by a definite judicial policy of refusing to allow, for want of equity any claims made by such unfaithful fiduciaries.

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496. The Eighth Circuit Court of Appeals in *Gillespie* v. *Piles & Co.*, 178 Fed. 886 at 892 (1910).

Prayer for Relief.

Wherefore, petitioner prays that those portions of the decree[496-A] and findings of the District Court[497] which were appealed from by the respondents, be affirmed, and that the decrees[498] and opinion[499] of the Circuit Court of Appeals be reversed, to the end that all fees and expenses be *denied* to City National Bank & Trust Company of Chicago, as former trustee, to the Granada Bondholders Committee, and to Defrees, Buckingham, Jones & Hoffman, as counsel for City National and as counsel for the Committee, that all costs in all courts be assessed against the respondents, that the cause be remanded to the District Court to determine, assess and enter judgment against the respondents for said costs, and for such relief as to this court may seem meet.

Weightstill Woods,
Attorney for Petitioner.

496-A. PR. 794-795.
497. PR. 769-794.
498. PR. 970-971.
499. PR. 955-969.

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APPENDIX "A".

Litigation Chart.

A Decade of Litigation (1928-1938).

Year	Title	Citation	Nature of Case
1928	*Albert Pick & Co. v. Granada Hotel Corp.*	Circuit Ct. of Cook Co.	Foreclosure on chattel mtge. on Granada furniture.
1928	*Wendstrand* v. *Pick & Co.*	U. S. District Court	Complaint for injunction to stop sale of furniture. Denied.
1930	*Wendstrand* v. *Pick & Co.*	38 F. (2d) 25	Appeal to C. C. A. 7th. Affirmed.
1930	*Wendstrand* v. *Pick & Co.*	281 U. S. 768	Petition for Writ of Certiorari denied.
1930	*Pick & Co.* v. *Indemnity Insurance Co. of North America*	U. S. Dist Ct.	Suit on bond in Wendstrand suit. $60,000 damages demanded.
1930	*People* v. *Granada Hotel Corp.*	50985 in Superior Court of Cook Co.	Dissolution of corporation by Atty. General of Illinois.
1930	*Thuma* v. *Granada Apts. Inc.*	519151 in Superior Court of Cook Co.	Partial foreclosure. (1928 2d Mtge. Bonds).
1933	*Appeal of Pick & Company*	269 Ill. App. 484	Determination of whether furniture was part of Real Estate. Held to be personal property.
1935 March	*Tuttle* v. *Harris*	U. S. Dist. Ct. No. 59143	Reorganization proceeding against old Granada Hotel Corp. Dismissed on May, 1937 on mandate from Supreme Court.
1935 April	Second Petition for Reorganization	U. S. District Court	Reorganization against Granada Apts. Inc. Dismissed in May, 1937 by Judge Barnes.
1935	*Tuttle* v. *Harris*	No. 5488 in C.C.A. (7th)	Appeal on question of whether foreclosure receivership was act of bankruptcy. Held: Yes.
1936	*Tuttle* v. *Harris*	297 U. S. 225	Supreme Court held that this was not an act of bankruptcy. Reversed.
1937	*Rosenberg* v. *Granada Apts., Inc.*	Mun. Ct. of Chicago No. 2778211	Suit on Bond delinquency. Judgment entered 3-8-37. No. 4630.
1937	*Rosenberg* v. *Granada Apts., Inc.*	Cir. Ct. Cook Co. No. 37C3704	Suit for Appointment of receiver. (Creditor's Bill.) Receiver appointed 4-14-37.
1937	*In re Granada Apartments, Inc., Debtor.*	U. S. Dist. Ct., Danville, Ill.	Involuntary pet'n for reorganization under 77B proceedings. This was consolidated with next action below.
1937	*In re Granada Apartments, Inc., Debtor.*	U. S. Dist. Ct., Chicago, No. 65811	Voluntary pet'n for reorganization under 77B. (Danville pet'n transferred to Chicago to be heard with this case).

This chart is based upon the testimony of respondents' attorney (PR. 473-504).

APPENDIX "B".

Former Fiduciaries.

CHICAGO TRUST COMPANY	Original "house of issue" of Granada bonds (1924) and co-sponsor with the Cody Trust Company of the (1928) issue. Author of the two prospectuses which represented that furniture was security for bondholders. Trustee under 1924 and 1928 Trust Deeds. Consolidated with Central Trust Company in July of 1931.
CODY TRUST COMPANY	Formed in 1928 by the Codys, Riddle and others as a new house of issue. Co-sponsors with the Chicago Trust Company of a new first mortgage (1928) and second mortgage bond issue. Officers of this company were officers of Granada Apartments, Inc. from 1929 to 1934 and as such controlled all policies. Cody Trust Company has been dissolved.
CHICAGO TITLE & TRUST CO.	Was appointed nominal receiver of Granada under the Thuma partial foreclosure of June, 1930. Order of appointment provided it could not disturb the (Cody) management in control. This disability was later (Jan. 12, 1934) removed. Relinquished receivership to Central Republic March 22, 1934.
CENTRAL TRUST COMPANY	Partner with Chicago Trust Company in the consolidation of July, 1931.
CENTRAL REPUBLIC BANK AND TRUST COMPANY	The name assumed by the consolidated company. It became the successor trustee under the 1928 trust deeds.
CENTRAL REPUBLIC TRUST CO.	The new name assumed by the Central Republic Bank and Trust Company after that organization eliminated its deposit banking business which was taken over by City National Bank and Trust Co., on October 5, 1932. It became the successor to the Successor Trustee.

This chart is based upon the findings of fact of the trial court at PR. 769-793.

Former Fiduciaries—(Continued).

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO	Former Trustee in the Superior Court foreclosure proceedings, and present Granada Depository and Transfer Agent as appointed by the Federal District Court. Was claimant and counter-claim defendant in the court below where charges of mismanagement and preference by City National, were made by the Court Trustee, and is respondent herein.
THE CORPORATE REORGANIZATION DIVISION	A department at the City National Bank and Trust Company, which was a business getting device for that bank. Officers and employees of this department were members of the Granada Bondholders' Protective Committee. By this department 425 corporate reorganizations have been secured for City National.
GRANADA BONDHOLDERS PROTECTIVE COMMITTEE	Formed by and including officers of the City National Bank and Trust Company of Chicago, who as members of "the Committee" named City National as Trustee in the state court proceedings.

APPENDIX "C".

Apartment Hotel Corporations.

GRANADA HOTEL CORPORATION	Predecessor of the debtor. Incorporated by Fred Mateer in 1924. Signer of bond issues. Dissolved by Attorney General in 1930.
GRANADA APARTMENTS, INC.	The debtor herein which filed its petition for 77B proceedings on April 23, 1937. Organized by Cody Trust Co. in 1929 as a hedge against the Pick claim which was not assumed by this new corporation.
GRANADA APARTMENTS HOTEL CORPORATION	Successor of the debtor herein.
THE GRANADA PROPERTY	A hotel-apartment house located at 525 Arlington Place, Chicago, Illinois. The chief possession of three successive Granada corporations, and several receivers and trustees. Furnished in 1924 with $120,000 worth of furniture. Owner of central heating, refrigeration, and water plant for other hotel properties.
ARLINGTON, INC.	The new corporation which owns the hotel-apartment house located at 530 Arlington place, across the street from Granada; former lessee of services from Granada heating and refrigeration plant. Built in 1924 by Mateer. Reorganized in Circuit Court of Cook County.
LINCOLN PARK MANOR HOTEL 500 Fullerton Parkway Corporation	A hotel-apartment house located on Fullerton Avenue across the alley to the rear of Granada, also a Mateer development, former and present lessee of heat, water and refrigeration services from Granada. Built in 1924.

This chart is constructed from the testimony of respondents' attorney (PR. 473-504) and from the trial court's findings (PR. 769-793).

APPENDIX "D".

Findings of Fact by the Trial Court to Which Respondents Did Not Assign Error.

Paragraph of the court's findings	Record	Portion of the Paragraph Admitted
1	R. 406, PR. 769	All of paragraph.
2	R. 406, PR. 769	All of paragraph, except the words "under Chapter II and X of amended law."* [Not argued by respondents.]
3	R. 406, PR. 769	All of paragraph.
4	R. 406, PR. 769-770	All of paragraph, except words "to defend, and is now carrying on this litigation by order of the court."* [Not argued by respondents.]
5	R. 406, PR. 770	All of paragraph.
6	R. 407, PR. 770	All of paragraph.
7	R. 407, PR. 770-771	All of paragraph.
8	R. 407, PR. 771	All of paragraph.
9	R. 407, PR. 771	All of paragraph.
10	R. 408, PR. 771-772	All of paragraph, except words "The Judge deems that application of Chapter II and Chapter X of bankruptcy amendments approved by the President June 22, 1938, to this litigation is practicable and desirable. The decree herein shall so provide."* [Not argued by respondents.]
11	R. 408, PR. 772	All of paragraph including "a copy of the prospectus upon which the Granada bonds were sold is in this record. It specifically states that the furniture and fixtures at Granada are part of the security for the bondholders' money, in addition to the real estate at Arlington Place, consisting of land and hotel building."
12	R. 408, PR. 773	All of paragraph except the words, "Mr. Mateer owned the corporate stock."* [Not argued by respondents.]
13	R. 408-409, PR. 773	All of paragraph.
14	R. 409, PR. 773	"Granada Hotel Corporation, an Illinois Corporation, (not the debtor) was organized and signed the bonds marketed in 1924 by the Chicago Trust Company as a house of issue. * * * Albert Pick & Company of Chicago supplied the furniture on open account and chattel mortgage * * * what became of that much furniture is not shown by the record."

* Although specified as error, this point was not discussed in respondents' briefs in the Circuit Court of Appeals.

Paragraph of the court's findings	Record	Portion of the Paragraph Admitted
15	R. 409, PR. 773-774	None of paragraph.
16	R. 409, PR. 774	"A prospectus was issued by Chicago Trust Company, and a separate one by Cody Trust Company. Both of these documents are in the record; they repeat the announcement made to the bondholders in 1924, that the security includes the furniture and fixtures at Granada Hotel." (This related to the new refinancing in 1928 which was also admitted.)
17	R. 409-410, PR. 774	All of paragraph except words "In the Wenstrand suit in this court bonds were given of $5,000, $20,000 and finally $40,000 to stay the sale."* [Not argued by respondents.]
18	R. 410, PR. 774-775	All of paragraph.
19	R. 410, PR. 775	All of paragraph except words "To protect those who initiated the bond issue and sold the bonds, another employee or nominee of Cody Trust named Thuma, was now used to file on June 10, 1930, a suit for partial foreclosure in the Superior Court of Cook County upon a claim of default upon certain interest coupons of the 1928 second mortgage Granada issue."* [Not argued by respondents.]
21	R. 410-411, PR. 776	All of paragraph.
22	R. 411, PR. 776	"There was no assumption (by Granada Apartments, Inc.) of furniture indebtedness. This was expressly excluded along with claims of all the general creditors of the Granada Hotel corporation. Having made the 1928 issue in this manner, the bankers used some of it to retire the 1924 issue, but did not pay off the furniture indebtedness."
23	R. 411, PR. 776-777	"This Granada Apartments, Inc., from its beginning was officered by employees of Cody Trust Company, and was wholly under its control."
24	R. 411-412, PR. 777	"Indemnity Insurance Company of North America wished to be released from all those damage claims and suits. * * * Since then Seventy-five Hundred ($7500) Dollars additional has been paid from Granada funds in reduction of the receiver's certificate. * * *"

* Although specified as error, this point was not discussed in respondents' briefs in the Circuit Court of Appeals.

Paragraph of the court's findings	Record	Portion of the Paragraph Admitted
25	R. 412, PR. 777-778	"For said $4,000 face balance and interest, a claim was made in this court against Debtor estate. * * * The Superior Court was not informed about the damage claims and proceedings on the Wendstrand and appeal bonds * * * it was not known (to any court or Granada creditors) that officials of Cody Trust Company and Wendstrand had agreed to purchase the receiver's certificate if it was not paid off out of Granada funds; nor was it known * * * that Wendstrand and others are indemnitors upon all the Wendstrand bonds in this court."
26	R. 413, PR. 778	"* * * that Codys and the Chicago Trust Company both had represented to the bondholders and the public through the mails in 1924 that furniture and personal property at Granada was part of the security; and that Cody Trust Company and Chicago Trust Company had made the same representation again in 1928 in relation to the refinancing * * *."
27	R. 412, PR. 779	All of paragraph.
28	R. 412-413, PR. 779	"The last interest paid to any bondholders was to pay first mortgage coupons for 1931. * * * None has been paid since."
29	R. 413, PR. 779	"All the litigation prior to August 1933, had affected only the second mortgage trust deed. In that month the cross bill to foreclose the first trust deed was filed; and immediately this receivership certificate was asked for. * * * Decree of foreclosure was not entered until December 18, 1936, which was more than forty months later."
30	R. 413, PR. 779	None of paragraph.
31	R. 413, PR. 779-780	"* * * the main and controlling purpose of I. I. C. N. A. in advancing $11,500 was to save itself from liability in said damage suit, and secure release of same. This was accomplished by a stipulation for dismissal filed in this court, signed not only by Albert Pick & Company, but also by respondent and International & Industrial Securities Corporation, to whom this Granada money was paid."
32	R. 413-414, PR. 780	All of this paragraph except words, "Nominees of Cody Trust Company operated the property until January, 1934."* [Not argued by respondents.] And "At that time school tax warrants owned by Granada needlessly were sold at a discount."

* Although specified as error, this point was not discussed in respondents' briefs in the Circuit Court of Appeals.

Paragraph of the court's findings	Record	Portion of the Paragraph Admitted
33	R. 414, PR. 780-781	"At that time (March 1934) until the Central Republic Trust Company went into receivership near the end of 1934, the City National Bank and Trust Company furnished the personnel and service on the trusts including the Granada matter, as to which the Central Republic Trust Company was nominal trustee." "When Central Republic * * * went into receivership an order was secured * * * on motion of Granada Bondholders Committee to appoint City National * * * as * * * successor trustee. * * * The Bondholders Committee filed a petition requesting that action by the court."
34	R. 414, PR. 781	"It (the Bondholders Committee) had been organized in April 1933, by and among minor officers, employees and nominees of City National Bank and Trust Company."
35	R. 414, PR. 781	"It is admitted by the pleadings and in evidence here that Mr. Hall was so retained to represent and to keep informed the Cody Trust Company and their successors in interest. When the Court took possession of the property, claims were filed upon Granada bonds of the 1928 issue of second mortgage (by) * * * Cody Trust Company."
36	R. 414-415, PR. 781-782	"The records show that the attorneys whom they (City National) now retain, have been active in all these matters since 1924, and have had to do with most of these litigations. It does not appear that City National or anyone tried at any time to, have the Codys or the Cody Trust Company or its officials, or the Chicago Trust Company, or its officials, or any successors or receivers for them, or Wendstrand and the other indemnitors on the court bonds that were released by buying the Pick furniture the second time with bondholders' money, and buying new furniture from LaSalle Furniture and Supply Company when Pick & Company took away part of the furniture, to have any of these persons perform their promises and duty to the Granada property and the Granada Bondholders."
37	R. 415, PR. 782	None of paragraph.
38	R. 415, PR. 782-783	"At date of its charter, October 5, 1932, City National took over from Central Republic Bank and Trust Company, and now continues as part of its trust department a personnel organized and called the Corporate Reorganization Division."

Paragraph of the court's findings	Record	Portion of the Paragraph Admitted
39	R. 415-416, R. 783	All of paragraph including "The Lincoln Park Manor is still in process in that court. For it there is a similar City National Bondholders Committee. City National was trustee for both Arlington and Lincoln Park Manor."
40	R. 416, PR. 783	"The Committee when formed by City National included representation from Cody Trust Company, * * * The minutes produced in this court to show what action was taken by the Granada Committee, do not show that any constructive action was ever taken looking toward a reorganization of the Granada property. The only matter recorded prior to discussion of the present proceedings in this court was refusal to accept an offer of twenty cents per dollar face value for the bonds on deposit with the committee and City National as its depositary."
41	R. 416, PR. 783-784	None of paragraph.
42	R. 416, PR. 784	None of paragraph.
43	R. 417, PR. 784-785	None of paragraph.
44	R. 417, PR. 785	"(one set of attorneys) have prepared the financial papers and (represented) Chicago Trust Company, Thuma, and also * * * Central Republic Trust Company, and City National Bank and Trust Company and the Bondholders Committee for Granada property."
45	R. 417, PR. 785-786	None of paragraph.
46	R. 417-418, PR. 786	* * * "In present reorganization case, City National and said attorneys filed in writing objection and motion to dismiss on May 17, 1937, in an effort to thwart and stay all action by this court."
47	R. 418, PR. 786-787	None of paragraph.
48	R. 418, PR. 787	"City National Exhibit 'X' was prepared by Defrees, Buckingham, Jones and Hoffman, attorneys. They are in this court in this accounting litigation, representing City National, the Granada Bondholders Committee and a separate accounting suit against Arlington, Inc. * * * They filed the Thuma partial foreclosure on the Granada property in 1930. * * * At that time these attorneys withdrew as counsel for Thuma, and immediately appeared on the opposite side of the record as counsel for Chicago Trust Company, then for the Bondholders Committee, and then for City National. These attorneys have represented throughout, the Bondholders Committee for the Granada, the Arlington and the Lincoln Park Manor properties, and likewise the City National as Trustee for these properties."

Paragraph of the court's findings	Record	Portion of the Paragraph Admitted
49	R. 418-419, PR. 787-788	"Neither the attorneys nor the Bondholders Committee, nor the City National presented any plan at any time to the bondholders or anyone else for the joint operation or unit reorganization of the three properties. * * * From that time (May 1929) until now these properties were bondholders equities. No person in a confidential relationship to one of these properties could rightfully represent another."
50	R. 419, PR. 788	None of paragraph.
51	R. 419, PR. 788	"After 1931 no interest was paid to first or second mortgage bondholders: the tax bill unpaid rose from about $30,000 in 1931 to about $60,000 in May 1937."
52	R. 419, PR. 788	None of paragraph.
53	R. 419, PR. 788-789	None of paragraph.
54	R. 419, PR. 789	None of paragraph.
55	R. 419-420, PR. 789-790	None of paragraph.
57	R. 420, PR. 790-791	"The court does not intend to minimize, but does recognize the many wrongs and injustices to the debtor estate shown by this record, which have been committed by City National, by the Bondholders Committee and by their attorneys and counsel; the court finds that all equities are with the Court Trustee; but the court believes that justice to all concerned will be rendered more speedily if the opposing claims and contentions are set off against each other. * * *"
58-72	R. 421-422, PR. 791-793	None of these paragraphs.

[Respondent's Assignment of Errors upon which this Digest is based is to be found at pages 817 to 832 of the Printed Record. The findings of the District Court are at pages 769 to 795 of the printed record.]

APPENDIX "E".

Facts of the Case Shown By Admissions of Record in the Pleadings By Respondents.

Admissions by City National by Pleadings as Indenture Trustee.

(1) That claim is against "Granada Hotel Corporation" and not against "Granada Apartments, Inc., poration, debtor herein. (PR. 79, par. 2.)

(2) That as trustee, City National allowed its predecessor trustee, Central Republic Trust Company, to be forever discharged from any and all liability for breaches of trust in relation to Granada. (PR. 114.)

(3) That the Superior Court decree expressly disapproved the accounts of City National as successor trustee. (PR. 115, compare with assertion at PR. 80 and at PR. 141.)

(4) That the furniture was not paid for out of the proceeds of the first mortgage. (PR. 117.)

(5) That the Cody Trust Claim is invalid. (PR. 120.)

(6) That it seeks to charge debtor $3,857 for objecting to the bankruptcy jurisdiction of the United States District Court. (PR. 121.)

(7) That it paid one Edward Hall $50.00 per month out of debtor's funds for purpose of keeping the Cody Trust Company "informed". (PR. 116.)

(8) That it failed to pay several current bills of the debtor which failure necessitated payment by the Court Trustee. (PR. 122.)

Admissions by Pleadings by the Bondholders' Committee.

(1) That it was organized and has functioned since April 25, 1933. (PR. 156.)

(2) That it solicited the depositing of bonds. (PR. 156-157.)

(3) That the members of the committee served without compensation; they being in the employment of City National. (PR. 159.)

(4) That since 1932 City National has had a special department of bank employees who were paid by City National, but whose services were charged to these committees. (PR. 159.)

(5) That the committee has since 1933 used the personnel, employees and facilities of City National. (PR. 159.)

(6) That the members of the committee were employed by City National "not as members of any committee, but as employees or officers devoting their time to the Reorganization Division of City National Bank and Trust Company of Chicago." (PR. 159.)

(7) That the committee then "retained" City National as Depositary and otherwise. (PR. 159.)

(8) That it was really the reorganization department of City National and not the committee that performed services and functions of the ordinary and usual committee. (PR. 161.)

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